THEORY'S LIMITS: PHILOSOPHY AND THE LAW

by

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ABSTRACT

The relationship between law and philosophy is easily and often overstated. In this dissertation, I shed some light on the appropriate relationship between law and philosophy. The primary problem I identify is confusing a conceptual issue for a practical one. While theory can help clarify almost any problem, it has limits. And it is just as important to understand the limits as to understand the theory.

This dissertation begins to identify some of those limits as they relate to legal issues. The dissertation explores the appropriate use of philosophy of language in arguments concerning how to interpret legal texts, especially constitutions. It then points out the futility of attempting to clarify legal doctrine with more precise definitions, such as definitions of "religion" and "commercial speech." Finally, it explores the relationship between philosophical debates concerning free will and legal debates over the extent to which free will is relevant to legal accountability. The legal lesson is that current trends to treat brain science as dispositive of issues concerning legal accountability should be viewed with skepticism.

In the end, I hope to convince the reader that, while the methods of philosophy are valuable to those analyzing law, the conclusions of philosophers are more likely to cause confusion than clarity if they are imported into the decisions judges make in interpreting law. For those engaged in interdisciplinary work in the two areas, the message is not "stop," but "proceed with caution."

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INTRODUCTION

The relationship between law and philosophy is easily and often overstated. The temptation to consider philosophical debates directly relevant to law frequently stems either from law professors hoping to find additional support for their legal positions with misunderstood philosophy or from philosophy professors hoping to make practical their arguments by mistranslating them into legal arguments, or so it might be hypothesized. Regardless of the explanation, there are many examples of scholars in both disciplines overstating the relationship between law and philosophy. My focus here, however, will be on the misuse of philosophy in legal scholarship.

In this dissertation, I hope to shed some light on the appropriate relationship between law and philosophy. By law, I mean primarily the rules and principles interpreted and applied by judges, including such things as common law, statutes, administrative rules, treaties, and constitutions. I recognize that there is law that escapes this definition because it does not lend itself to judicial interpretation, such as legal rules interpreted and applied exclusively by the political branches. But most of what we consider law, or at least most of what we consider law that leads to the misunderstood relationship with philosophy, is captured by my definition.

By philosophy, I mean such things as metaphysics, epistemology, philosophy of language, moral theory, political philosophy, and applied ethics. As with law, it is perhaps easiest to define the discipline by what those considered to work in the discipline

do. In the case of philosophy, that would include the debates and arguments of philosophers. While the boundaries of law and philosophy may be imprecise, borderline cases will not be my focus. For my purposes it is enough to focus upon what is undisputedly philosophy and undisputedly law, as sufficient confusion exists over their relationship to fill this dissertation.

In the end, I hope to convince the reader that, while the methods of philosophy are valuable to those analyzing law, the conclusions of philosophers are more likely to cause confusion than clarity if they are imported into the decisions judges make in interpreting law. For those engaged in interdisciplinary work in the two areas, the message is not "stop," but "proceed with caution."

Summary of Chapters

This dissertation divides into four chapters. Each chapter is an example of the difficulties of transporting the substance of philosophical debates to legal debates. The chapters have been published in the journal of *Law and Philosophy, The John Marshall Law Review*, *George Mason University Civil Rights Law Journal*, and as a book chapter in *Moral Psychology Today*: *Essays on Values, Rational Choice, and the Will*.

Chapter 1 highlights an inappropriate use of philosophy of language in arguments concerning how to interpret legal texts, especially constitutions. Ronald Dworkin employs a version of the semantic/pragmatic distinction to argue that constitutional provisions should be interpreted to make them the best they can be, morally speaking. I argue that once the semantic/pragmatic distinction is properly understood, the only light that distinction sheds on constitutional interpretation is to confirm what most people

naturally believe, namely that constitutional text should be interpreted in accordance with what those who drafted it were trying to say and those originally governed by it understood the drafters to say. In the end, the hunt for what the framers meant by constitutional text is not different in kind from, for example, the hunt for what David Hume meant in the Treatise on Human Nature. We are not searching for what we would have meant were we writing the Treatise on Human Nature today, but for what Hume meant when he wrote it. Dworkin's employment of philosophy of language serves only to obscure this point.

Chapter 2 highlights a problem with importing philosophical debates over the nature of a concept into debates over how to interpret a particular use of that concept in a legal text. Legal scholars often draw upon debates over the nature of religion and what qualifies as a religion in developing theories of how to interpret the Religion Clauses in the First Amendment. I analyze a number of these attempts to define "religion" for constitutional purposes and argue that reliance upon those philosophical debates only adds to the interpretative confusion. What this chapter reveals is that rarely is it fruitful to focus on concepts instead of particular conceptions when interpreting legal texts. The legal purpose of the text should govern the definitions of its words, regardless of whether those definitions are precise by philosophical standards. Philosophical debates concerning semantic content have little significance in interpreting legal texts.

Chapter 3 further illustrates the problem identified in Chapter 2 by describing the problems encountered by the United States Supreme Court in attempting to distinguish commercial and noncommercial speech for purposes of the Free Speech Clause. The example illustrates how legal interpretation is so practical in nature that placing too much

emphasis upon definitions not only distorts legal analysis, but, more important, also strips the law of predictability, a characteristic philosophy can live without, but law cannot. For this reason, boundaries between commercial and noncommercial speech should be abandoned or drawn in a manner that judges can identify the boundary and citizens typically can predict the location of that boundary without judicial intervention.

Chapter 4 provides a different kind of example of the relationship between law and philosophy. It illustrates how philosophy can help those engaging in legal analysis from taking wrong turns, even if philosophy cannot definitively indicate the direction legal analysis should take. The example involves the relationship between philosophical debates concerning free will and legal debates over the extent to which free will is relevant to legal accountability. The legal lesson is that current trends to treat brain science as dispositive of issues concerning legal accountability should be viewed with skepticism. Such science must be filtered morally to have relevance to accountability, which means such science should not be used to show, for example, compulsion as a matter of law to excuse otherwise criminal behavior or that it would be unconstitutional to hold someone legally culpable given their brain state. Instead, science is relevant for juries determining guilt and policymakers who inject moral considerations into law.

In the end, hopefully these examples will shed some light on the relationship between law and philosophy and give some pause to those attempting to import one discipline to the other. The primary problem exemplified in those examples is confusing a conceptual issue for a practical one. While theory can help clarify almost any problem, it has limits. And it is as important to understand the limits as to understand the theory. This dissertation begins to identify some of those limits as they relate to legal issues.

CHAPTER 1[1]

PUTTING MEANING IN ITS PLACE

Introduction

Originalism has become the prevailing approach to constitutional interpretation, with legal scholars as diverse as Justice Antonin Scalia and Ronald Dworkin among its advocates (Ackerman 1991; 1998; Amar 1998; Barnett 1999; 2003; Dworkin 1997a; 1997b; Flaherty 1995; Lessig 1997; McConnell 1997; Moore 2001; Perry 1994; Scalia 1997; Treanor 1995; Whittington 1999). Current originalists advocate fidelity to constitutional text,[2] but disagree about what such fidelity requires.[3] To settle these disagreements, it seems natural to expect originalists to employ (at least implicitly) conclusions and arguments from philosophy of language. Ronald Dworkin does just this

[1] Reprinted with with kind permission of Springer Science and Business Media. Springer, Law & Philosophy, *Putting Meaning in Its Place: Originalism and Philosophy of Language*, Vol. 25, 2006, 387-416, Troy L. Booher

[2] An important recent shift in focus for many originalists has been from concern only with the subjective intent of those who drafted the Constitution to concern with how the text itself was originally understood or the "objective" intent of the drafters. This shift explains originalism's recent resurgence as an acceptable method of constitutional interpretation for many legal scholars. For a discussion of this point, see Barnett (2003).

[3] I do not directly address fidelity to prior interpretations of the Constitution, although precedent ultimately must be addressed by anyone advancing a method of constitutional interpretation. Whatever interpretative method one adopts (unless it advocates uncritically following precedent), there will be instances in which precedent is at odds with the result one would reach independent of precedent. For this reason, all methods of interpretation ultimately must have something to say about the role of precedent. For a recent discussion of how originalists might deal with precedent, see Barnett (2005).

to argue against other originalist interpretations and to advocate what he calls a moral reading of the Constitution.

Dworkin's arguments for his moral reading of the Constitution are inconclusive because, and to the extent, they employ unwarranted philosophical assumptions about how to interpret texts. As a result of these deficiencies, the originalist position outlined by Dworkin unexpectedly collapses into the position of his most vociferous originalist rival, Justice Scalia.

The argument proceeds in five stages. The first stage explains Scalia's and Dworkin's originalist methods for interpreting the Constitution, using the Eighth Amendment's prohibition of inflicting cruel and unusual punishment to illustrate. The second stage outlines Dworkin's argument for rejecting Scalia's method and preferring his own. The third stage scrutinizes Dworkin's argument to expose unwarranted philosophical assumptions about how to interpret texts. The fourth stage shows that philosophy of language teaches us that interpreting constitutional text requires considerable attention to the historical context in which it was enacted. The final stage demonstrates that, contrary to Dworkin's previous position in *Law's Empire*, discerning the historical understanding of legal texts is not impossible and indeed is presupposed in Dworkin's more recent work. The aim of this chapter is to show not only that Dworkin's argument leaves Scalia's method of constitutional interpretation unscathed, but also that Scalia's method should be the starting point for anyone concerned with fidelity to constitutional text.

Two Versions of Originalism

In explaining his method of interpreting constitutional text, Scalia first points out the tension he sees between democracy and common law judging. According to Scalia, insofar as common law judges *make* law when they decide cases, common law judging is dangerous to democracy because where "the power of judging [is] joined with legislative, the life and liberty of the subject [is] exposed to arbitrary controul, for *the judge* . . . then [is] *the legislator*" (Scalia 1997, 10). According to Scalia, our legal system guards against this danger with separation of powers, and partly because of this, ours is "a government of laws and not of men," where the "text is the law, and it is the text that must be observed" (Scalia 1997, 22, 25). Proper interpretation of the Constitution thus requires fidelity to the text itself. On this much, Dworkin and Scalia (and most every other legal scholar) agree.[4]

Scalia then explains how to interpret the text of the Constitution. The "original meaning of the text, not what the original draftsmen intended" determines how the Constitution should be interpreted (Scalia 1997, 38). Writings by the framers are important only because they reveal how intelligent and informed people at the time understood the Constitution. For Scalia, the content of the Constitution does not change over time; yet the Constitution covers new circumstances not specifically contemplated at the time of ratification if a reasonable (intelligent and informed) person's understanding of the text at the time suggests this result. Simply put, Scalia's theory instructs a judge to determine, to the extent possible, how a reasonable person at the time of ratification understood the Constitution and then to apply that result to the present case.

[4] For one example, consider Cass Sunstein, "Everyone agrees that the Constitution is law" (Sunstein 1993, 93).

To illustrate, Scalia provides an example of how to interpret the Eighth Amendment's prohibition on inflicting cruel and unusual punishment. Scalia argues that capital punishment is not unconstitutional, at least in part, because capital punishment "*is explicitly contemplated in the Constitution*" (Scalia 1997, 46). The Fifth Amendment provides that no person shall be deprived of life without due process of law or held to answer for a capital crime without a grand jury indictment. These provisions, coupled with the fact that capital punishment was inflicted before and after ratification, make it unlikely that a reasonable person's understanding of the Eighth Amendment in 1791 was that it prohibited capital punishment. Because of such evidence, Scalia interprets the Eighth Amendment to permit each state and the federal government to decide whether to inflict or to forbid capital punishment.

Dworkin agrees with Scalia that proper constitutional interpretation requires fidelity to the text itself. Dworkin, however, distinguishes text "drafted in exceedingly abstract moral language"—for example, the Equal Protection and Due Process Clauses—from the rest of the Constitution (Dworkin 1996, 7). Dworkin interprets the nonabstract clauses—for example, the requirement that the President be at least 35 years of age—in the same way as Scalia. Dworkin claims that the abstract clauses, however, "must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power" (Dworkin 1996, 7). The abstract nature of these clauses implies that judges should "do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic

abstraction, command"[5] (Dworkin 1994, 145). Scalia would reject Dworkin's conclusion that judges should "construct, reinspect, and revise" because this describes the method of common law judges in tension with principles of separation of powers.

Dworkin's support for his moral reading of the abstract clauses is as follows: "Enlightenment statesmen were very unlikely to think that their own views represented the last word in moral progress [and, if they had,] . . . they would have made plain that they intended to create a dated provision" (Dworkin 1997a, 124). For this reason, Dworkin reads the abstract clauses to express abstract moral principles, which implicitly instruct judges to use their best moral judgment to interpret these clauses. Dworkin then concludes that "the application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says" (Dworkin 1997a, 122). Dworkin believes that judges sometimes should interpret a provision of the Constitution in a way that is not in accordance with how the provision was understood at the time of ratification or intended by those who drafted the document.

To illustrate, consider how Dworkin interprets the Eighth Amendment prohibition, which reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] "If the correct interpretation is the abstract one, then judges attempting to keep faith with the text today must sometimes ask themselves whether punishments the framers would not themselves have considered

[5] While Dworkin is the best example of one who holds this view, he is not alone. For example, Lawrence Sager argues that because certain provisions of the Constitution express "broad structural propositions and moral generalities," the text itself obligates those interpreting it to use independent moral judgment "to fill in these general stipulations with concrete applications, to fashion workable and defensible conceptions of the Constitution's moral concepts" (Sager 1998, 238). Jack Balkin recently has advanced similar arguments (Balkin 2007).

[6] U.S. Const. amend. 8.

cruel . . . nevertheless, are cruel"[7] (Dworkin 1997b, 1253). This is because the term "cruel," as it appears in the Eighth Amendment, means "punishments that are in fact—according to the correct standards for deciding such matters—cruel" (Dworkin 1997b, 1252). If our best moral reasoning tells us that capital punishment is cruel, which Dworkin believes it does, then capital punishment is unconstitutional despite the fact that this result conflicts with the original understanding of the Eighth Amendment.

Dworkin's Argument

Dworkin distinguishes two kinds of intention in order to argue against Scalia. Dworkin points out the difference between "what some officials intended to say in enacting the language they used, and what they intended—or expected or hoped—would be the consequence of their saying it"[8] (Dworkin 1997a, 116). Dworkin calls the former "semantic intentions" and the latter "political intentions" (Dworkin 1997b, 1255). An example will illustrate the difference. Suppose that I tell a rebellious adolescent that she should not attend college. However, I expect and hope she will do the opposite—enroll in college—just to be rebellious. What I said was that she should not attend college, but what I expected to occur as a result was that she would attend college. In fact, it was crucial that my words did *not* convey what I expected to occur. So Dworkin correctly observes that what one expects to occur as a result of speaking is not always the same as what one says.

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[7] Notice, however, that Dworkin, without explanation, simply ignores the words "and unusual" in the provision.

[8] Although Dworkin never cites him, Michael Moore recognized the importance of these distinctions for constitutional interpretation as early as 1985 (1985). Moore similarly distinguished an "intention to accomplish certain effects" from an intention to mean something by using certain words, what Moore called "semantic intentions" (1985, 339).

Dworkin calls an originalism concerned with semantic intentions "semantic originalism" and an originalism concerned with political intentions "expectation originalism" (Dworkin 1997a, 119). According to Dworkin, semantic originalism "insists that the rights-granting[, abstract] clauses be read to say what those who made them intended to say," whereas expectation originalism "holds that these clauses should be understood to have the consequences that those who made them expected them to have" (Dworkin 1997a, 119). Dworkin (1997a) provides an example to illustrate the difference:

> Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss said, and intended to say, was that the most qualified applicant should be hired, and if the manager thought some other applicant better qualified, but hired the boss's son to save his own job, he would not be following the standard the boss had intended to lay down. (116-17)

Dworkin believes that evidence of how the framers or ratifiers would have expected provisions of the Constitution to be applied in specific cases is irrelevant to determining how to interpret constitutional text, just as the boss's expectation that his son will be hired is irrelevant to determining how to interpret what the boss said.

When Dworkin's distinction between semantic originalism and expectation originalism is applied to the Eighth Amendment's prohibition on inflicting cruel and unusual punishment, the upshot becomes apparent. Dworkin (1997a) drives the point home as follows:

> [An expectation originalist] supposes that the framers intended to say, by using the words "cruel and unusual," that punishments generally thought cruel at the time they spoke were to be prohibited - that is, that they would have expressed themselves more clearly if they had used the phrase "punishments widely regarded as cruel and unusual at the date of this

> enactment" in place of the misleading language they actually used. [A semantic originalist] supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual. (120)

When this distinction is properly understood, Dworkin argues, it becomes clear that current judges should exercise their best moral judgment to decide whether capital punishment is cruel and therefore prohibited by the Eighth Amendment.

Evaluating Dworkin's Argument

At first glance, Dworkin's argument against Scalia appears decisive. Scalia cites how the framers understood and would have applied the Eighth Amendment as evidence of how to interpret that provision. As will become apparent, however, Dworkin's distinction between semantic intentions and political intentions does not help to clarify how to interpret constitutional text. To understand why this is so, we must look more closely at why Dworkin believes that the evidence Scalia cites would be "irrelevant" for a semantic originalist (Dworkin 1997a, 120, 123-24).

The evidence Scalia cites to support his interpretation of the Eighth Amendment is as follows: (i) explicit references to capital punishment in the Fifth Amendment, (ii) the widespread practice of capital punishment after enactment, (iii) the framers' intent to embed the moral values of the time in the Bill of Rights, and (iv) the framers' aversion to leaving the development of "an evolving national morality" to judges instead of elected officials (Scalia 1997; Dworkin 1997a). For Scalia, such evidence supports his reading of the Eighth Amendment as permitting capital punishment. Other than drawing and relying upon a distinction between semantic intentions and political intentions, however, Dworkin never explains specifically why such evidence is irrelevant to

interpreting constitutional text. Let's consider how Dworkin's distinction could be doing this work.

There are two ways of understanding Dworkin's wholesale rejection of the evidence cited by Scalia. First, Dworkin may be employing a distinction between semantics and pragmatics to maintain that political intentions are irrelevant to determining what Dworkin sometimes calls the "natural semantic meaning" of the text (Dworkin 1997a, 124). For instance, when Dworkin asserts that the broad language used in the Eighth Amendment dictates his moral reading of the clause, he seems to be claiming that it is the semantic content of the words in the clause that leads to his interpretation; that is, the extension of the term "cruel" may well encompass capital punishment even though a majority of native English speakers in the United States in 1791 and today believe otherwise. Second, Dworkin may agree that some pragmatic facts, such as background assumptions of the framers, are relevant to interpreting the Eighth Amendment, but nonetheless may claim that what Dworkin calls political intentions are irrelevant pragmatic facts. Ultimately, either way of understanding Dworkin's argument fails to support the claim that the evidence Scalia cites is irrelevant to interpreting the Eighth Amendment.

Semantics and Pragmatics

It is well known that in uttering a sentence one can imply more than "what is said," where what is said is identified with the semantic content of one's utterance. That is, the meaning conveyed when one utters some words can vary as the context in which one utters those words varies. For example, irony and sarcasm are not fully captured by

the semantic content of the words speakers use. Facts about the words one utters are not the only facts relevant to interpreting one's utterance.

We can crudely call "pragmatic facts" all nonsemantic facts—such as facts about context—that are relevant to utterance interpretation.[9] Consider the following examples designed to help flesh out (at least the intuitive sense of) the distinction between semantics and pragmatics.[10]

First, I utter the sentence "I tried to get to work today" after I successfully arrive at work. Intuitively, what I uttered seems at least inappropriate and perhaps false. At first glance, this seems to create a problem for semantics because, strictly speaking, the sentence I uttered expresses something true as long as I did not arrive at work inadvertently. After all, typically one at least has *tried* to get to work when one arrives at work. To avoid locating the inappropriateness with the semantic content of the words, many philosophers, most notably Paul Grice, separate semantic content from implications reasonably derived by the addressee given certain pragmatic principles governing conversation, in Grice's terms, "conversational maxims" (Grice 1989, 26). On Grice's account, the inappropriateness of what I uttered is not explained by the semantic content of the words, but rather by certain pragmatic principles, such as "make your contribution as informative as is required" and "do not make your contribution more information than is required" (Grice 1989, 26.) Our intuition that uttering the sentence is at best inappropriate need not be reflected in the semantic content of the term "try" as long as we

[9] I say "crudely" because context plays an important role in semantics as well, e.g., the semantic content of indexicals (Kaplan 1989).

[10] Although there are many different distinctions the semantics/pragmatics distinction may be shedding light upon, e.g., the type/token distinction, the sentence/utterance distinction, the meaning/use distinction, the linguistic meaning/speaker's meaning distinction—it is not necessary to settle upon any one of these distinctions here. Whether we consider interpreting a particular constitutional provision to be interpreting a sentence token, utterance interpretation, determining how language was used, or discovering speaker meaning, we must attend to pragmatic facts to perform the required task properly.

can attribute it to pragmatic facts, such as pragmatic principles governing conversion or perhaps certain background assumptions understood by the addressee (Szabo 2005a).

Second, assume that in a letter of recommendation for a student applying for a philosophy job, the student's professor writes as follows: "X has great command of the English language, and his attendance in class was regular."[11] While the message that the student is not a good candidate for the job is not contained in the semantic content of words uttered by the professor, nonetheless it is the message the professor intended to convey, and the addressee should have understood as being conveyed, given the context in which the words were uttered. In contrast, if someone has just questioned the student's progress in mastering English because of poor attendance in the professor's class, the utterance is conveying a different message altogether. The difference is typically explained by differences in pragmatic facts, not differences in semantic content. In Grice's terms, while what the professor said may not have changed, what the professor meant did change.

In his boss example, Dworkin seems to presuppose some formulation of the distinction between semantics and pragmatics when he declares that we should be interested only in "what was said" (Dworkin 1997a, 116-17; 1997b, 1255). Dworkin claims that the boss instructed that whoever, as a matter of fact, is most qualified should be hired, even if the manager reasonably understood the boss to believe that his son is the most qualified applicant and "might not have given the instruction unless he was confident that the manager would think so too" (Dworkin 1997a, 116-17). Dworkin's claim seems correct as long as we draw a distinction between semantics and pragmatics and identify "what is said" with the semantic content of the words uttered by the boss.

[11] This is a variation on Grice's example (Grice 1989, 33).

While the context of the conversation may lead the manager to understand the boss's instruction as directing him to hire the son, it does not follow from this that the semantic content of the words informs the manager to hire the son. Pragmatic facts may affect the way the manager reasonably interprets the utterance, but they need not affect the semantic content of the words uttered. In this way, Dworkin can maintain that the boss's expectation (political intention) that his son be hired is irrelevant to interpreting the boss's instruction.

If Dworkin is relying on a traditional distinction between semantics and pragmatics, then his argument rests upon highly contentious ground. Even among those philosophers who accept that the distinction is illuminating, most of them recognize that the distinction is particularly problematic (Szabo 2005a; Kadmon 2001; Bach 1999). Dworkin should not presuppose, without argument, a certain traditional formulation of the distinction to claim that political intentions are irrelevant to constitutional interpretation.

More important, however, assuming there were a noncontentious formulation and that tracked what is relevant to determining semantic content, it is unclear why only semantic content is relevant to interpreting the Constitution.[12] Constitutional interpretation involves interpreting particular utterances (written utterances by a group), and utterance interpretation has both a semantic and pragmatic component. As Zoltan Szabo has explained when outlining the traditional view held by Grice, "Semantics is concerned with what is said, pragmatics with what is implicated, and utterance interpretation—the process whereby the addressee ascertains what the speaker meant—

[12] In fact, it seems doubtful that interpretation is ever wholly independent of pragmatic facts because it is always possible that the words in question were uttered by an actor, and to know otherwise is to introduce pragmatic facts.

has typically both a semantic and pragmatic component"[13] (Szabo 2005a, 3). In other words, the distinction between semantics and pragmatics is introduced mainly to provide a framework in which one can explain how it is that what a speaker conveys can fail to be fully determined by the conventional linguistic meaning of the sentence she utters (Bach 1999). It is simply a mistake to assume that constitutional interpretation does not involve reference to pragmatics.

Because we are interpreting particular utterances when we interpret the Constitution, a distinction between semantics and pragmatics cannot explain why political intentions are irrelevant to constitutional interpretation. Put another way, when interpreting the Constitution, we are not concerned with what the language type "cruel and unusual punishments" means, but rather we are concerned with how to interpret a particular token of "cruel and unusual punishments," uttered by particular speakers at a particular time. Semantic content, while relevant, is not all that concerns us when interpreting language tokens such as the Eighth Amendment.[14]

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[13] This is not to ignore the distinction J. L. Austin draws between illocutionary and perlocutionary acts. The former refers to what one intends to do in uttering certain words (in uttering "Watch out!" I mean to warn you that a train is coming), whereas the latter refers to what one intends to accomplish by making the utterance (by uttering "Watch out!" I mean to bring you to a halt) (Austin 1962, 83-94). One reason this distinction is important, as Szabo explains, is that it permits one to read Grice as stating that the relevant intended effect in the addressee are the illocutionary effects not perlocutionary effects (Szabo 2005a). This does not mean, however, that understanding the intended perlocutionary effect is irrelevant to utterance interpretation as Dworkin's argument requires, but rather that it is not necessary to know the intended perlocutionary effect to interpret an utterance properly. While it may not be necessary to know the age of a speaker in Chicago to determine whether she is using the phrase "It's da bomb" to refer to an explosive device, it certainly would be relevant information.

[14] This also explains why attempts to employ a theory of meaning and reference developed by Saul Kripke (Kripke 1980) and Hilary Putnam (Kripke 1975) (K-P semantics) to interpret constitutional texts are bound to fail. Nicos Stavropoulos argues that Dworkin is best understood this way (Stavropoulos 1996). Stavropoulos argues that the term "cruel" is a rigid designator of evolving moral standards regarding cruelness just as the term "gold" is a rigid designator of substances with atomic number 69. The claim that K-P semantics applies to moral terms is a highly contentious one, but more important, even if Stavropoulos' argument is successful, his claims are beside the point. K-P semantics is designed to shed light upon sentence meaning and semantic content, not utterance interpretation more generally. Kripke himself explicitly recognizes that pragmatic facts are relevant to interpreting specific utterances (Kripke 1998; Ostertag 1998). In fact, the point of drawing a distinction between semantics and pragmatics is

If Dworkin is employing a distinction between semantics and pragmatics to argue that political intentions are irrelevant to interpreting constitutional text, then his argument not only rests upon highly contentious ground but also contains a false premise, namely, that interpreting a particular text involves merely determining the semantic content of the words used in the text. Dworkin's argument that political intentions are irrelevant to constitutional interpretation fails.

Political Intentions and Pragmatics

Perhaps recognizing the problems with his way of relying upon a distinction between semantics and pragmatics, Dworkin ultimately seems to accept that pragmatic facts are relevant to constitutional interpretation. In particular, Dworkin recognizes that "[h]istory is crucial to [constitutional interpretation], because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did" (Dworkin 1996, 8). So Dworkin at times agrees that when we interpret the Constitution we are engaged in utterance interpretation, which requires attention to more than semantic content or sentence meaning. In Grice's terms, Dworkin is now concerned with what the framers meant rather than only with what they said. Yet Dworkin still maintains that "[w]e must take care to make a distinction . . . between what someone means to say and what he hopes or expects or believes will be the consequence

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typically to keep the various ways in which we use words to communicate from soiling our tidy semantic theories.

As for Dworkin, it is unclear whether he agrees with Stavropoulos' characterization of his work. Elsewhere, Dworkin rejects the notion that there are "political kinds" but nonetheless proceeds as if there were political kinds, stating that "in fact there are instructive similarities between natural kinds and political concepts" (Dworkin 2004). However, even this (seemingly) more modest claim requires Dworkin to explain the relationship between his method of interpretation and his moral theory. How do we determine whether capital punishment indeed is cruel, as a matter of fact? For a discussion that casts doubt upon whether Dworkin can provide an adequate explanation of this relationship, see Mahoney (2004).

for the law of his saying it." (Dworkin 1992, 381). Even if pragmatic facts are relevant to utterance interpretation, according to Dworkin, political intentions are not.

Without employing some formulation of the semantics/pragmatics distinction, however, Dworkin cannot maintain that what he calls political intentions are irrelevant to constitutional interpretation. We can understand why this is the case by noticing different ways in which language can be used by speakers to refer. Language can be used to designate directly objects a speaker is understood to have in mind or to designate objects that satisfy a description even when the speaker is not understood to have the objects in mind. To illustrate these uses, consider the following three examples involving the phrase "Smith's murderer will die."[15] For every example, assume that you and I are in a courtroom where Jones is on trial for Smith's murder.

First, the prosecutor has just stated that the defendant tested positive for AIDS, and I turn to you and say, "Smith's murderer will die." In this context, "Smith's murderer" is used to refer to Jones, whether Jones is convicted of murdering Smith and whether Jones, as a matter of fact, killed Smith. Second, the prosecutor has just stated that the physical evidence taken from the scene demonstrates that the person who killed Smith has AIDS, and I turn to you and say, "Smith's murderer will die." In this context, if Brown, as a matter of fact, killed Smith, then "Smith's murderer" is used to refer to Brown, even if Jones is convicted of murdering Smith. Third, the prosecutor has just stated that the brutal nature of the crime demands that she seek the death penalty, and I

[15] My examples are variations on those provided in Donnellan (1966). While some philosophers, such as Saul Kripke, have argued that the referential use of descriptive language Donnellan identifies illustrates a pragmatic, not a semantic, phenomenon, these arguments are not relevant to the point made here (Kripke 1998; Ostertag 1998). Kripke recognizes that speakers may use descriptive language referentially, and that if we want to interpret their utterances correctly, then we do not simply identify the semantic content of the words they use (Kripke 1998). In any event, insofar as Dworkin recognizes that pragmatic facts are relevant to utterance interpretation, arguments such as Kripke's are unavailable to Dworkin.

turn to you and say "Smith's murderer will die." In this context, perhaps "Smith's murderer" is used to refer to Jones, but perhaps not. Even if Brown killed Smith, if a jury convicts Jones, then (unfortunately) "Smith's murderer" is used to refer to Jones. However, if the charges against Jones are dropped and Brown is later convicted, then "Smith's murderer" is used to refer to Brown.

In the first example, "Smith's murderer" is used simply to refer to a particular object that I am understood to have in mind, namely, Jones.[16] In the other two cases, "Smith's murderer" is used to refer to whatever satisfies a certain description. In the second case, it is used to refer to whatever satisfies the description *whoever, as a matter of fact, killed Smith*. In the third case, however, it is used to refer to whatever satisfies a different description, something like *whoever, as a matter of fact, is convicted for Smith's murder*. The best interpretation of the utterance of "Smith's murderer will die" in these examples differs with differing contexts.[17]

With these distinctions in mind, reconsider Dworkin's boss example. We are now in a position to understand that the boss's use of the phrase "most qualified applicant" could inform the manager differently depending upon further explication of the context in which the boss uttered his instruction. More important, we are now in a position to understand why the evidence Scalia cites is not irrelevant to interpreting the Eighth Amendment.

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[16] It is important to note that the distinctions I am making do not return originalism to relying exclusively on the subjective intentions of the framers. What is important is what the framers were reasonably understood to have had in mind, not what the framers actually (perhaps secretly) had in mind. While the latter typically informs the former, the fact that they are distinct permits originalists to maintain that it is the reasonable understanding of the Constitution at the time of ratification that guides constitutional interpretation (Alexander 2004).

[17] It is not just definite descriptions that can be used referentially, but rather almost any descriptive language. In a deed, a description of "36 degrees running north of a creek," refers to a particular creek, not just any creek that one will find somewhere south of the property, perhaps in Peru. Technical terms also can be used the same way.

First, the boss could have used the phrase "most qualified applicant" to designate directly an object he had in mind, perhaps his son. Dworkin seems to recognize this possibility when he feels the need to insert "(without winking)" into the example. If we picture the boss winking, it removes most doubt that the phrase "most qualified applicant" is used simply to refer to the boss's son.

However, this is not the only way "most qualified applicant" could be used to designate directly the boss's son. If a discussion had just occurred in which the manager explained that the boss's son was the most qualified applicant, then the statement to the manager to hire the most qualified applicant could (without a wink) inform the manager to hire the boss's son even if a more qualified applicant, in Dworkin's sense, applied thereafter.[18] And if just after uttering his instructions the boss tells the hiring manager that his son is to use the corner office, then it becomes even less plausible to interpret the boss's instruction as anything other than a direction to hire his son.

When a speaker's actions are inconsistent with a possible interpretation of her utterance, that interpretation is thereby less plausible. Thus, Dworkin is mistaken that the following evidence is irrelevant to interpreting the Eighth Amendment: (i) the framers explicitly provided specific protections for those accused of capital crimes[19] just three paragraphs before uttering "cruel and unusual punishments shall not be inflicted" and (ii) capital punishment was routinely inflicted after ratification. Ironically, Dworkin seems to recognize the relevance of such evidence when discussing how to interpret the phrase "using a firearm" in a statute: "We do not know what Congress actually said, in

[18] Dworkin flatly denies this, but without employing a distinction between semantics and pragmatics, it is difficult to understand how this could fail to be the proper interpretation of the boss's instructions in this context (Dworkin 1997b).

[19] Specifically, the Fifth Amendment provides protection for anyone accused of "a capital, or otherwise infamous crime," which encompassed all felonies at the time.

using a phrase, until we have answered the question of what it is reasonable to suppose, in all the circumstances including the rest of the statute, it intended to say in speaking as it did"[20] (Dworkin 1997a, 117).

Second, even if the phrase "most qualified applicant" was used to refer to whatever satisfies a certain description, that description may not be the one Dworkin assumes. Suppose that the new job is to manage a new store, and the boss makes it no secret that he believes managers who use an autocratic management style (AMS) tend to be the best store managers. Other things being equal, hiring an applicant who employs AMS satisfies the boss's instruction more than hiring someone who employs, for example, an empowerment management style (EMS). In that context, it is the boss's conception of "qualified," rather than the concept "qualified" (if there is such a thing), that guides the hiring manager in following the boss's instruction.

Now assume the hiring manager knows that the boss prefers his store managers to employ AMS *because* a business magazine the boss always trusts has endorsed AMS. It is also clear that while the boss trusts the hiring manager's judgment of character, he does not trust the hiring manager's independent judgment on which management style is most effective in his stores. After telling his manager to hire the most qualified applicant for the new job, the boss dies, and the magazine subsequently retracts its endorsement of AMS and instead endorses EMS. Now fidelity to the boss's instruction requires the hiring manager to give great weight to EMS applicants even though the boss neither would have done so nor would have expected the hiring manager to have done so at the time he gave his instruction.

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[20] Elsewhere, when explaining what "textual fidelity" requires, Dworkin recognizes that one "cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say" (Dworkin 1997b, 1253).

Background assumptions about what sources of information, or whose judgment, speakers consider trustworthy can be relevant to interpreting their utterances. Thus, Dworkin is mistaken that evidence the framers' intended to embed the moral values of the time in the Bill of Rights because they did not want to leave the development of "an evolving national morality" to judges is irrelevant to interpreting the Eighth Amendment. In response, Dworkin insists on separating the question of who is to interpret the Constitution from the question of what is the correct interpretation of the Constitution (Dworkin 1997a; 1997b; 1996; 1986). While these two questions are conceptually distinct, the answer to the former may shed light on the answer to the latter. Simply because it is today generally uncontroversial the Supreme Court is the final, exclusive authority on how to interpret the Constitution, if the framers had a greater interpretative role for other branches of government or juries in mind, that would be relevant to how to interpret the Constitution. More specifically, if a provision was addressed to, and intended to be interpreted by, all branches of government or juries, then the evolving moral judgments of different branches or the people themselves could be relevant to interpreting the Constitution (Kramer 2004a; 2004b; Whittington 2001; McConnell 1998).

Third, Dworkin could be correct that the phrase is used to refer to whatever satisfies the description *whoever, as a matter of fact, is the most qualified.* If so, then the manager must use the best standards for deciding such matters to follow the boss's instruction. Dworkin assumes that this is the only plausible interpretation. Indeed, Dworkin claims that one "couldn't deny that [the hiring manager] had been faithful to [the boss's] instructions, and that she would not have been faithful had she deferred to

[the boss's] view about the best candidate instead of her own" (Dworkin 1997b, 1255). Yet once Dworkin recognizes that context is "crucial" to utterance interpretation, it is difficult to understand how Dworkin could maintain this claim without relying upon either some further assumptions about the case or unwarranted assumptions about the semantics/pragmatics distinction. As the context in which the boss uttered his instruction changes, the best interpretation of the boss's utterance changes. More important, as the type of evidence Dworkin calls political intentions changes, the best interpretation of the boss's utterance changes. Thus, the boss example cannot be used to illustrate the irrelevance of political intentions.

Scalia can agree with Dworkin that, because the framers had certain expectations about how the Eighth Amendment should be applied, "it does not follow that they meant to say anything different from what you and I would mean to say if we used the same words they did" (Dworkin 1996, 76). This is because Dworkin's conclusion that political intentions are *irrelevant* to interpreting the Constitution requires that it *never* follows that the framers meant to say anything different from what you and I would mean if we used the same words. As we have seen, however, Dworkin cannot maintain this claim. The context surrounding enactment of the Eighth Amendment, including the type of evidence Scalia cites, is relevant to interpreting that particular utterance; and thus, we must look to the historical context to determine *whether* the provision means the same thing were it uttered by Dworkin today.[21]

[21] Even if Dworkin were correct, however, it is far from clear what you or I would mean in uttering the phrase "cruel and unusual punishments" in ordinary speech. Most likely, if the phrase were uttered, it would be used in a technical, legal way, rather than simply to refer to those punishments that are both cruel and rarely administered, which seems to be what Dworkin assumes. The most natural understanding of (what ordinary English speakers would mean by) the utterance, "cruel and unusual punishments shall not be inflicted," is that they are employing technical, legal jargon, which requires inquiry into how the phrase is understood in legal contexts. Using this to guide legal interpretation, however, leads us in a circle.

When we interpret the Constitution we are interpreting particular utterances of words. For this reason, we are not merely seeking what Dworkin sometimes calls the "natural semantic meaning" of those words (Dworkin 1997a, 124). Rather, pragmatic facts are relevant to utterance interpretation. Yet once we understand the different ways in which the best interpretation of a particular utterance can vary as context varies, we can see that the evidence Scalia cites, what Dworkin calls political intentions, is highly relevant to constitutional interpretation generally, and interpreting the Eighth Amendment specifically. Dworkin's distinction between semantic intentions and political intentions, as well as his distinction between semantic originalism and expectation originalism, does little to clarify the task of interpreting the Constitution.

Interpreting the Eighth Amendment

For the same reason the best interpretations of the utterances of "Smith's murderer" and "most qualified applicant" change as the context changes, the context surrounding the utterance of "cruel and unusual punishments" in the Eighth Amendment could dictate that we interpret the provision differently than we would if we were to utter the words today. We must attend to the history surrounding enactment of the provision before we can interpret it properly. As Dworkin elsewhere recognizes: "History is crucial to [constitutional interpretation], because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did" (Dworkin 1996, 8). Let's consider a few possibilities.

Therefore, even if Dworkin were correct that the evidence Scalia cites is irrelevant to constitutional interpretation, Dworkin's interpretation of the provision does not readily follow.

First, perhaps there was a list of punishments the British Crown had inflicted that concerned the framers, and the Eighth Amendment was designed simply to ensure that those punishment were not inflicted by the new national government.[22] If so, then as long as capital punishment was not on the list, the Eighth Amendment should not be interpreted to prohibit capital punishment.

Second, perhaps the phrase "cruel and unusual punishments" was a technical term, used to refer to punishments considered cruel at the time and unusual in the sense that they were not recognized as legitimate punishments under the common law or any statute.[23] On this interpretation, judges simply are prevented from creating a cruel punishment on their own, which seems to be Scalia's concern with merging judging and legislating. The protections under the Eighth Amendment, then, would be protections from judges, not protections from elected officials or juries.

Third, perhaps the terms "cruel" and "unusual" were understood to work together such that the punishments prohibited by the Eighth Amendment evolve as the number of states inflicting certain punishments dwindles, as long as the states cease inflicting these punishments because they come to view them as inappropriately cruel. The Supreme Court seemed to adopt this interpretation in 1976,[24] and perhaps thought that by today so few states would inflict capital punishment that it would be sufficiently unusual because it was thought too cruel, not according to the ethical standards employed by individual judges, but according to the political judgments by citizens' representatives in the states.

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[22] In fact, while not dispositive, it does seem clear that the words of the Eighth Amendment were virtually copied from the English Declaration of Rights of 1689, which was enacted in "response to sentencing abuses of the King's Bench." *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting); but see Granucci (1969).

[23] *Harmelin v. Michigan*, 501 U.S. 957, 965-85 (1991) (tracing the history of the prohibition on cruel and unusual punishment in the English Declaration of Rights). For an influential and revealing discussion of how the Eighth Amendment was originally understood, see Granucci (1969).

[24] *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976); *see also Roper v. Simmons*, 543 U.S. 551 (2005).

In this way, the provision would not be static, but it also would not be dependent upon the moral judgment of individual judges.

Fourth, perhaps the phrase "cruel and unusual punishments" was understood to refer to whatever satisfies the description *whatever, as a matter of fact, is cruel*. If so, then capital punishment is prohibited if it qualifies as cruel according to what we currently take to be the correct moral standards for deciding such matters (whatever those are). This is how Dworkin interprets the phrase. Notice, however, that this interpretation is the least plausible on its face because it leaves unexplained why the words "and unusual" were included in the provision. Even if we ignore the words "and unusual," however, Dworkin's interpretation does not directly follow.

Perhaps the phrase was understood to refer to whatever satisfied a different description, such as *whatever qualifies as cruel according to the moral standards at the time*. In other words, perhaps the framers are best understood as embedding a certain conception of "cruel," rather than the concept of "cruel," in the Eighth Amendment, just as the boss is best understood as embedding a certain conception of "qualified" in his instruction by making it understood that he trusted the magazine's endorsement of management styles. While it is possible that moral standards generally accepted by the framers suggest capital punishment is cruel, it is also possible that these moral standards suggest otherwise. Notice that this understanding of the provision does not directly rely upon the expectations of the framers regarding individual cases: Even if they did not expect capital punishment to be prohibited when the Eighth Amendment was enacted, capital punishment may nonetheless qualify as "cruel" according to the moral standards at the time.

Dworkin rejects interpreting the provision as expressing the moral values at the time for the following reason: "Enlightenment statesmen were very unlikely to think that their own views represented the last word in moral progress [and, if they had,] . . . they would have made plain that they intended to create a dated provision" (Dworkin 1997a, 124). Notice that Dworkin's claim presupposes that the framers' opinions regarding moral progress are relevant to interpreting the Eighth Amendment, something Dworkin denies when Scalia cites the framers' intent to embed the moral views at the time in the provision. And consider how easily Scalia could respond to Dworkin's rhetorical claim: Enlightenment statesmen created a dated provision because they were wary of how future interpretations could take rights away, and if they had wanted to do otherwise, they would have made plain that they intended to create a changing provision.[25] Before we examine more fully the historical context in which the Eighth Amendment was enacted, Scalia is just as likely correct that the framers understood the provision to be dated because, as Scalia puts it, "otherwise [there] would be no protection against the moral perceptions of a future, more brutal, generation" (Scalia 1997, 145).

So how do we decide among these possible interpretations of the Eighth Amendment? We first need to know the pragmatic facts relevant to interpreting the Eighth Amendment, that is, whether "cruel and unusual punishments" was used as a

[25] Michael Moore provides an equally unpersuasive account of the historical context in which the Constitution was drafted as supporting his favored interpretation. Moore merely asserts that "[s]uch believers in natural rights as Hamilton and Madison took themselves to be referring to entities (natural rights) that had a nature independent of theirs or anyone else's thoughts about it[,]" and then concludes from this assertion that, "[w]hen believers in natural rights used phrases, such as 'no one shall be subject to cruel and unusual punishments' or no one shall be 'denied equal protection of the laws,' their semantic intentions were to refer to rights whose nature was to guide meaning" (Moore 2001, 1095). First, it is worth noting that neither Hamilton nor Madison was alive to draft or to ratify the Equal Protection Clause in 1868. Second, and more important, even if they had been, the mere fact that they believed in natural rights—in the sense Moore construes them—does not itself demonstrate that they intended to incorporate, or their contemporaries understood the Eighth Amendment to incorporate, natural rights.

technical term, whether there was other language that was purposefully rejected,[26] or whether there was a commonly known list of punishments inflicted by the British Crown that motivated inclusion of the provision. To answer these questions, however, we need to determine how a reasonable person at the time would have understood the Eighth Amendment. But this just *is* Scalia's method for interpreting the Constitution. For Dworkin's discussion of semantic originalism to support his reading of the Constitution, Dworkin first must employ Scalia's method for interpreting the Constitution. In this way, Dworkin's position collapses into (or perhaps presupposes) Scalia's position.

It is important to note that this does not mean that Scalia always applies his own method correctly. Scalia believes that his method precludes interpreting the provision as evolving, which excludes reading the provision to evolve as different punishments become unusual due to the changing moral assessments of state governments. Yet nearly all the evidence Scalia cites is consistent with this interpretation: the development of an evolving national morality is not left to judges and the Fifth Amendment's references to capital punishment are not superfluous because capital punishment was not "cruel and unusual" at the time. Nonetheless, Scalia's *method* of interpreting constitutional texts should be the starting point for anyone concerned with fidelity to the Constitution. Dworkin's use of arguments and conclusions from philosophy of language sheds no light upon how to interpret constitutional text.

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[26] It is worth noting that while the language in the Eighth Amendment is virtually identical to that in the English Declaration of Rights, it differed from the language used in all but one state constitution in 1791: Five states prohibited "cruel or unusual punishments," *see* Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, § XXII (1776); Mass. Declaration of Rights, Art. XXVI (1780); N. C. Declaration of Rights, § X (1776); N. H. Bill of Rights, Art. XXXIII (1784), and two others prohibited "cruel" punishments, see Pa. Const., Art. IX, § 13 (1790); S. C. Const., Art. IX, § 4 (1790), while one prohibited "cruel and unusual punishments," see Va. Declaration of Rights, § 9 (1776).

The Dworkin of Conversation

Dworkin's more recent work recognizes that interpreting constitutional text is much like interpreting speech in conversation: "constitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said" (Dworkin 1996, 10). Elsewhere, "When we are trying to decide what someone meant to say . . . we are deciding which clarifying *translation* of his inscriptions is the best," which is done by weaving "assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say" (Dworkin 1997a, 117). While the task of interpreting legal texts can be complex, it is not different in kind from what we do everyday when we interpret "what friends and strangers say."

The method of interpreting legal texts in Dworkin's recent work is what Dworkin called "conversational interpretation" in *Law's Empire*: "Conversational interpretation . . . assigns meaning in light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his 'intention' in saying what he did" (Dworkin 1986, 50). In *Law's Empire*, Dworkin rejected conversational interpretation in favor of what he called constructive interpretation: "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong" (Dworkin 1986, 52).

Let's call the early Dworkin who advocated constructive interpretation the Dworkin of Construction and the more recent Dworkin who employs conversational

interpretation the Dworkin of Conversation. At first glance, the shift in Dworkin's position seems surprising: the Dworkin of Conversation employs the very method of constitutional interpretation rejected by the Dworkin of Construction. However, a closer look reveals why, in Dworkin's view anyway, the Dworkin of Conversation and the Dworkin of Construction ultimately are advancing compatible methods of interpretation.

Recall that the Dworkin of Conversation assumes his distinction between semantic intentions and political intentions entitles him to conclude that certain historical evidence (such as that cited by Scalia) cannot be used to show that the framers meant anything other than what you and I would mean in uttering the words in the Constitution. From this, the Dworkin of Conversation concludes that the framers "must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power" (Dworkin 1996, 7).

If the Dworkin of Conversation were correct about the importance of his distinction between semantic intentions and political intentions, then employing conversational interpretation would lead to the same moral reading of the Constitution as constructive interpretation. For the Dworkin of Conversation, what we would mean in uttering, for example, "equal protection of the laws," likely would be whatever kind of legal equality is morally best, assuming we have had a moral education similar to that of Dworkin. Similarly, for the Dworkin of Construction, judges should interpret "equal protection of the laws" to embody the best vision of legal equality. In this way, Dworkin's methodological "shift" is not surprising: The Dworkin of Conversation ultimately advocates the same moral reading of the Constitution as does the Dworkin of Construction.

Had the Dworkin of Conversation been successful, he would have enjoyed an advantage over the Dworkin of Construction. By focusing upon the text itself, the Dworkin of Conversation has stripped more traditional originalists of the following rhetorical claim: Originalists like Scalia merely interpret text, which is politically neutral, while the Dworkin of Construction disregards text in favor of judges "imposing purpose," which permits the moral or political views of judges to rule (Dworkin 1996, 52).[27] Thus, the Dworkin of Conversation not only advocates the same moral reading of the Constitution as the Dworkin of Construction, but also grounds his moral reading in politically neutral textual interpretation.

As we have seen, however, the Dworkin of Conversation fails on both fronts because he misunderstands the import of his distinction between semantic intentions and political intentions. When we clear up that misunderstanding, we can see that conversational interpretation may not lead to Dworkin's moral reading of the Constitution.[28] Thus, the Dworkin of Conversation faces a choice: (i) abandon his moral reading of the Constitution and retain his politically neutral method of interpretation or (ii) abandon conversational interpretation and "shift" back to constructive interpretation

[27] Dworkin does not consider judges' engaging in constructive interpretation to be "legislating from the bench." Dworkin believes he deflects this charge by distinguishing "fit" from "political justification." Unlike legislators, judges are constrained by considerations of "fit" because, according to Dworkin, judges "may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation of other judges" (Dworkin 1996, 10). As Michael McConnell has pointed out, however, Dworkin provides no principled way to decide when fidelity to "text, history, tradition, and precedent" is proper and when judges should "exercise their moral-philosophical faculties" to make "the Constitution 'the best it can be'" (McConnell 1997, 1270). In other words, the historical constraint Dworkin gestures at is no constraint at all in practice because judges, without principle or text to guide them, decide when to give weight to history and when to ignore it. In the end, there is little difference between legislators and judges for the Dworkin of Construction.

[28] I say "may not" because I have not yet shown that when the historical context in which the Constitution was written is examined it does not inform us that we should consider our current moral views when interpreting the text. It seems unlikely for the Eighth Amendment, but nonetheless, further argument is required.

to retain his moral reading of the Constitution.[29] Dworkin can no longer have his politically neutral cake and eat it too.

Whether the Dworkin of Conversation abandons fidelity to text, we can see why the starting place for those concerned with fidelity should be to determine how constitutional text was originally understood; and what Dworkin calls political intentions are relevant to this task. Thus, far from relying upon irrelevant information when interpreting the Constitution and misunderstanding important philosophical distinctions, Scalia gets it exactly right. Scalia's originalist method should be the starting point for anyone concerned with fidelity to constitutional text.

In Chapter 2, we will see how Dworkin's focus on concepts instead of conceptions is unhelpful in interpreting constitutional text, even as a practical matter.

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[29] Evidence that Dworkin would not abandon his moral reading when it conflicts with fidelity is that the Dworkin of Conversation still characterizes his method of interpretation as constructive interpretation (Dworkin 1997b). Dworkin thinks this characterization is correct, in part, because he does not accept that there is a politically or morally neutral way to interpret legal texts (Dworkin 2004). As Ram Neta recently argued, this claim is dubious (Neta 2004). While this is not the place for a full discussion of the issue, it is worth noting that Dworkin's most recent argument in support of this claim fails.

Dworkin argues that that a certain type of positivist, such as Scalia, must take sides in legal disputes because his position entails that certain arguments legal disputants employ are legally irrelevant. For example, according to Dworkin, if Party A wants a court to disregard a statute because it would be unfair to apply it in her case, then because Scalia's position would entail that her opponent, Party B, should win under the law, Scalia is taking sides, and thus, is not remaining neutral (Dworkin 2004). However, such examples do not show that positivism, or at least the version adopted by Scalia, lacks neutrality, not in the relevant sense anyway. If the content of the statute were exactly the opposite, then Party B would be arguing that the law is unfair, and in that case Scalia would rule against Party B. Consider Scalia's dissent in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 429 (2002), in which Scalia recognized that a substantive due process right cannot be created to protect corporations from punitive damage awards any more than one can be created to ensure a woman's right to choose to have an abortion. The only "side" Scalia is taking is the side of those who were properly authorized to enact the relevant law in the first place. Opting out of a moral debate may have moral implications, but it does not necessarily amount to taking sides in the moral debate, any more than opting out of a scientific debate amounts to taking sides on contentious scientific issues. The fact that parties make certain moral arguments, which at times are accepted by judges, does not show positivism is incomplete any more than the fact that certain "intelligent design" arguments at times are accepted by scientists shows that science curricula in public schools is incomplete.

CHAPTER 2[30]

FINDING RELIGION FOR THE FIRST AMENDMENT

Introduction

Scholars and courts have struggled to come up with a definition of the term "religion" for the religion clauses, which provide, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[31] They have done this because they believe that finding a definition will help to provide a uniform test for whether something qualifies for protection under the Free Exercise Clause or raises concerns under the Establishment Clause (Agneshwar 1992; Beckwirth 2003; Choper 1982; Donovan 1995; Echols 2003; Greenawalt 1984; House 1999; Mason 1988; Penalver 1997). That aspiration is misguided: providing a single definition of the term "religion" will not help to apply the religion clauses. Their focus has been primarily upon *whether* the religion clauses require a broad or a narrow definition of the term "religion," whereas, as I will argue, their focus should be upon *when* the religion clauses require a broad definition and *when* they require a narrow definition. Finding the proper focus helps to dissolve some longstanding problems regarding the religion clauses—the

[30] Reprinted with kind permission of The John Marshall Law Review.
[31] U.S. Const. amend. 1.

so-called "tension between the clauses" and the lack of a definition of the term "religion" for religion clause jurisprudence.

As many scholars have noted, finding a single definition of the term "religion" that works in both religion clauses is extremely difficult. Some scholars claim that the framers used "religion" to refer only to theistic belief systems (Freeman 1983; Penalver 1997; Strang 2002). This definition, however, would lead to legally absurd results. For instance, Hinduism would qualify for full protection under the Free Exercise Clause while Buddhism, or at least Zen Buddhism, would receive none (Taliaferro 1998; LaFleur 1988). Courts have recognized the need to protect nontheistic belief systems such as "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism" under the Free Exercise Clause.[32] Occasionally, courts even consider conscientious objections to war, whether based in theistic beliefs or not, to qualify as religious.[33] A legally acceptable interpretation of the Free Exercise Clause, therefore, must include nontheistic belief systems.

A more expansive definition of the term "religion," however, creates practical problems in interpreting the Establishment Clause. For example, if a deeply held, but nontheistic, moral objection to war could qualify for protection under the Free Exercise Clause, then arguably, the moral theory that generates the objection cannot be taught in public schools without violating the Establishment Clause. Yet such a result is legally unacceptable.

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[32] *Torasco v. Watkins*, 367 U.S. 488, 495, n.11 (1961).
[33] *Welsh v. United States*, 398 U.S. 333 (1970) (interpreting a federal statute that exempted religious conscientious objectors from the draft to include those with "deeply held moral, ethical, or religious beliefs" against war).

To avoid this kind of result, some scholars have proposed that the term "religion" be defined differently in each clause (Tribe 1978). This, however, is an attempt to reach the desired legal result by ignoring the text of the Constitution. The word "religion" only occurs once in the two clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[34] Thus, it seems implausible that the definition of the term "religion" varies between the two clauses.[35]

Nonetheless, the Free Exercise Clause seems to require a more expansive definition than the Establishment Clause. Thus, providing a definition of "religion" that works in both clauses is difficult. But there is another problem: there simply is no single, correct definition of the term "religion" as it occurs in ordinary English. These problems have led some scholars to conclude that the religion clauses present a unique challenge for courts. For instance, one scholar claims that "the inability of the court to provide an adequate definition of religion in the First Amendment has given rise to a number of inconsistent and contradictory decisions" (House 1999, 257).

While there have been "inconsistent and contradictory decisions," their primary cause is not the courts' inability to provide a definition of the term "religion." To the extent the lack of a definition hinders consistent interpretations of the religion clauses, it creates no greater problem for those clauses than for others. Such terms as "life," "executive," and "press" present nearly identical definitional challenges for constitutional interpretation. The lack of a precise definition of the term "religion" in the religion clauses presents no greater interpretative challenge than does the lack of precise

[34] U.S. Const. amend. 1.
[35] That is, if indeed there are two clauses. Stephen Carter has argued that the better approach is to recognize only one clause (Carter 2002). Nothing here is inconsistent with this approach.

definitions for terms in other clauses. In other words, despite the definitional challenges, there is nothing constitutionally special about the term "religion."

Yet there is something quite special about religion. A religion can play many roles in a person's life. A religion can be "an institution . . . an ideology or worldview . . . a set of personal loyalties . . . locus of community, akin to family ties . . . an aspect of identity," and it can provide "answers to questions of ultimate reality, and offer[] a connection to the transcendent" (McConnell 2000, 42) These different aspects of religions are important in different legal contexts, or so I will argue. For instance, if courts exempt religious conscientious objectors from military service, they are treating religion as a set of personal loyalties, an ideology, and an aspect of identity.[36] This explains why we are also tempted to exempt atheistic conscientious objectors: their conscientious objections similarly involve a set of personal loyalties, their ideologies, and aspects of their identities. In contrast, if courts exempt religions from antidiscrimination laws, they are treating religion as a private institution formed to exhibit and embody a worldview. The autonomy of the religion itself is violated if, e.g., the Catholic church must ordain and "hire" female priests.

Because different aspects of religions are relevant in different legal contexts, what qualifies for protection under the Free Exercise Clause or raises concerns under the Establishment Clause depends upon the legal context. In other words, even if there were a uniquely correct definition of the term "religion" as it occurs in ordinary English, it should not fix the definition in the religion clauses because what qualifies as a religion should, indeed must, differ across differing legal contexts. Thus, not only should we not

[36] *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

expect a single definition of "religion" but, for legal purposes, we also should not desire one.

Providing a single definition for the religion clauses would create more problems than it would solve. This is not to suggest that two definitions, one for each clause, would resolve the problems. The single occurrence of the term "religion" in the religion clauses makes such an interpretation implausible. More important, however, a single definition for each clause still ignores the relationship between the legal context and what qualifies as a religion in that context. Properly understanding this relationship has at least two benefits: (i) we will cease the futile search for a single "correct" definition of the term "religion" for the religion clauses and (ii) we will obtain a greater understanding of what is required to reduce whatever tension exists between the two clauses. Perhaps more important, however, we will be in a better position to diagnose the "inconsistent and contradictory decisions."

The argument advances in three stages. The first stage outlines the different approaches scholars and courts have used to provide a definition of the term "religion" in the religion clauses and exposes problems with each approach. The second stage shows that even if we could produce an acceptable, single definition of the term "religion," it would not help in interpreting and applying the religion clauses because what qualifies as religion differs across differing legal contexts. Third, I will illustrate how recognizing the contextual nature of what qualifies as a religion places us in a better position to diagnose and reduce whatever tension exists between the clauses. In the end, the interpretation of the religion clauses that emerges from this recognition is that the religion

clauses are best understood as extensions of neighboring clauses—Free Speech, Equal Protection, etc.—into the religious context.[37]

The Futile Search for a Single Definition of "Religion"

Before examining different proposed definitions of the term "religion," we must first determine what it is we want from an adequate definition for the religion clauses. The practical motivation of those attempting to provide a definition of "religion" is to help courts avoid inconsistent and contradictory decisions (House 1999; Donovan 1995; Niles 2003). To do so, a definition must satisfy at least two minimal criteria. First, it must assist courts in deciding difficult cases. Otherwise, it cannot help to eliminate the problems the lack of an adequate definition supposedly creates. Second, a definition cannot produce clearly counterintuitive legal results: it must be neither too broad nor too narrow. Some deviation from our basic intuitions about what the religion clauses protect or forbid is tolerable (and perhaps expected), but *gross* deviations are a sign that the definition simply trades inconsistency for counterintuitive results.

In general, courts and scholars employ three approaches to providing a definition of the term "religion" for the religion clauses. First, some scholars provide definitions by trying to figure out how the framers used the term "religion." I will call this the "originalist approach," even though, for reasons I will provide, what is characterized as the "originalist approach" does not reflect the more recent discussions of originalism referenced in the first chapter of this dissertation. Second, some scholars attempt to identify something unique to religions and appeal to that unique trait to define "religion."

[37] This is not to say, however, that the religion clauses are superfluous. As Mark Tushnet points out, any protection afforded to religious expression under the Free Exercise Clause is also afforded under the Free Speech Clause (Tushnet 2001).

I will call this the "uniqueness approach." Third, some scholars, and many courts, identify religions by asking whether something is sufficiently similar to things that are widely accepted as clear examples of religions. I will call this the "analogical approach."[38]

The Originalist Approach

Originalists look to how the framers used the language in the Constitution, or how that language was originally understood, as a method of discerning its meaning. Specifically, they look to how the framers used the term "religion" in order to identify its meaning in the religion clauses. There seems to be general agreement about what the framers meant when they used the term "religion" in the First Amendment (Freeman 1983; Penalver 1997; Strang 2002).[39] As George Freeman argues, the framers referred to a creator, deity, or maker whenever they used the term "religion" (Freeman 1983). From this, Freeman concludes that the framers "equated religion with theism" (Freeman 1983, 1520). Many scholars are persuaded that for an originalist, theism is "a constitutionally necessary ingredient to qualify a belief system as a religion" (Donovan 1995, 36).

If this originalist definition were correct, and as I show later it is not, then it is unacceptably narrow and thereby fails to satisfy the second criterion of adequacy for a definition. For instance, Zen Buddhism and Taoism would not be religions under such a definition (LaFleur 1988; Taliaferro 1998). When we insert the definition into the religion clauses, the results are legally unacceptable. For example, the Free Exercise Clause would not protect Zen Buddhism and Taoism, nor would the Establishment

[38] The futility of some of these approaches may seem obvious. I discuss them because, as noted throughout, scholars and courts continue to employ them.
[39] *Malnak v. Yogi*, 592 F.2d 197, 201 (3d Cir. 1979).

Clause prohibit governments from requiring citizens to practice them.[40] Even if a purely theistic definition may have been legally adequate in 1791 given the lack of religious diversity and the applicability of the First Amendment only to the Federal Government, it is no longer legally adequate. Consequently, this definition fails to satisfy the second criterion of adequacy for a definition.

It is worth pausing to note, however, that for reasons discussed in Chapter 1, originalism is not committed to the theistic definition traditionally attributed to it. The recent shift in focus for many originalists from the subjective intent of the framers to the original understanding of the text makes the fact that the framers only had theistic religions in mind less than decisive when interpreting the scope of the religion clauses. The historical context is very likely to reveal that the framers understood "religion" to concern worship and teaching more than views about a certain deity.

The Uniqueness Approach

Other scholars define the term "religion" by attempting to identify traits that all religions share and that only religions possess. If such traits exist, then perhaps they can be used to define the term "religion" for the religion clauses. We can divide attempts to identify something unique to religion by the type of unique trait sought: (i) a unique set of concepts of which the content of the term "religion" is composed, (ii) a unique kind of input that produces religious beliefs, and (iii) a unique kind of output that religious beliefs produce. I will call these three different methods the "content-based method," the "epistemological method," and the "functional method," respectively.

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[40] Even if there are other constitutional reasons why government could not require such conduct, it nonetheless would be legally absurd if violation of the Establishment Clause were not among them.

The Content-Based Method

Those employing the content-based method attempt to specify the simple concepts out of which the complex content of the term "religion" is composed. This is a familiar way in which we try to define terms. For instance, we define the term "bachelor" by decomposing it into the simple concepts of which its content is composed, namely "male," "unmarried," and "adult." With the simple concepts identified, we can determine which things are bachelors; in this case, the unmarried male adults. If we identify the simple concepts that compose the content of the term "religion," then we similarly may be able to determine which things are religions.

Using the content-based method, Anand Agneshwar defines religion as "a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions" (Agneshwar 1992, 295). For Agneshwar, there must be supernatural content, among other things, for any purported religion to qualify as such.

Agneshwar's definition fails. Not all religions employ the supernatural. For example, pantheists, some Unitarians, and Taoists do not (Peterson 1991). Yet they all should qualify for protection under the Free Exercise Clause and raise concerns under the Establishment Clause. If a set of concepts does not apply to some religions, then that set cannot comprise the simple concepts out of which the content of the term "religion" is composed. Because some religions fail to employ the supernatural, Agneshwar's definition fails.

Ludwig Wittgenstein's often-cited discussion of the term "game" illustrates the general problem with the content-based method (Witttgenstein 1958, ¶66). Wittgenstein

points out that there is no single way to decompose the content of the term "game" into simple constituents. Hockey, backgammon, throwing a ball against a wall, and solitaire are all games. But what do they have in common? There is no set of simple concepts that applies to all games, such as "board-games, card-games, ball-games, Olympic-games," etc. (Witttgenstein 1958, ¶66). Because the things that qualify as games are so diverse, there is no single decomposition of the term "game" into simple constituents.

The same is true for the term "religion." Zen Buddhists do not believe in a deity, some early religions lack awe and reverence, and Mormons do not believe in the transcendent (Taliaferro 1998). Also, while something as broad as a concern for ultimate reality may capture all religions, it also likely captures much of mainstream science and philosophy. Any set of simple concepts that applies to some religions will fail to apply to all religions or will apply to nonreligions. Thus, the content-based method fails to satisfy the second criterion of adequacy for a definition because ultimately it produces definitions that are too narrow, too broad, or both.[41]

The Epistemological Method

Those employing the epistemological method attempt to identify unique inputs for religious beliefs. According to the epistemological method, religious beliefs are arrived at in a unique way. If we can identify a distinctive epistemology of religious beliefs, then perhaps we can use it to define the term "religion" for the religion clauses.

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[41] The following definition provided by Eli Echols incurs similar problems: Religion is a life system that "recognizes what is divine; . . . includes rules governing behavior, traceable to the divine, that do not contradict the 'golden rule;' and . . . calls on its participants to conform to the rules of the divine" (Echols 2003, 121). It is unclear why a religion could not reject the divine or the "golden rule" and yet remain a religion. Perhaps recognizing this, Echols later states that "a life system's rules proceed from the divine in some way that is analogous to those of the major religions," which seems closer to the analogical approach (Echols 2003, 133-34). Because the analogical approach also fails, it does not matter which approach Echols would choose.

Craig Mason uses the epistemological method to identify religions as belief systems involving ultimate concerns where "ultimate" means something like "all values and 'knowledge' which cannot be proven true, or even tested, by empirical evidence[, but rather] rest upon some type of non-rational 'faith'" (Mason 1988, 456). Robert Audi relies upon an epistemological distinction to argue that religious arguments should not shape public policy (Audi 1993). Audi distinguishes religious arguments by claiming that they do not provide motivation for a "rational and informed person" (Audi 1993, 677). Audi then uses this epistemological distinction to conclude that we must "separate religion from law and public policy" (Audi 1993, 677).

Such epistemological distinctions are widely accepted. For instance, agnostics think that belief in a deity is epistemologically different from ordinary beliefs. Atheists also think that there is something epistemologically unique (and suspect) about belief in a deity. Most theists accept that belief in a deity is epistemologically unique as well. Wittgenstein is credited with pointing out that if you tell me that God is in the next room, and I look in the room and report that God is not there, I have not *disproved* your claim, but rather have shown that I do not *understand* your claim.

Even if this is the case, however, there is still a problem with defining the term "religion" using an epistemological distinction. Different religions have different conceptions of what makes it the case that one is supposed to hold their beliefs. For instance, what, if anything, justifies the beliefs of Buddhists differs from what, if anything, justifies the beliefs of Calvinists (Taliaferro 1998; Peterson 1991). No single epistemological category captures all types of religious beliefs. Some religions do not incorporate a deity, and, more to the point, some religions do not advocate accepting their

doctrines on faith (Taliaferro 1998). Thus, even if one can distinguish some religious beliefs epistemologically, one cannot similarly distinguish all religious beliefs because religious beliefs are too diverse in their epistemology.

Even if we ignore some of the diversity of religious beliefs and consider only belief in a deity, the epistemological method still fails. The theological and philosophical questions that one must answer to establish that belief in a deity has a distinctive epistemology are too contentious for this method to produce an adequate definition. In other words, the question of whether belief in a deity has a distinctive epistemology is at least as disputed as the original question of which belief systems are the referents of the term "religion."[42]

For some atheists, the fact that some religious beliefs require faith is not enough to make them epistemologically distinctive. For instance, some atheist philosophers think that all beliefs are justified (and perhaps true) only relative to a perspective.[43] For these philosophers, all beliefs—even scientific ones—are ultimately based upon an unsupportable assumption. Unlike some theists who elevate religious beliefs to the epistemological status of scientific beliefs, these philosophers demote scientific beliefs to the epistemological status of unsupportable religious beliefs.

But even if we reject these philosophers' radical theses regarding scientific beliefs, it is more difficult to reject a similar claim regarding moral beliefs. In other words, even if scientific beliefs are not ultimately based upon an unsupportable

[42] For instance, while an agnostic does not know that a deity exists, she need not take a stand upon whether others know that a deity exists or whether others know that a deity exists in the same way as she knows that things exist generally. In other words, while an agnostic lacks evidence of a deity's existence, she need not take a stand upon what *kind* of evidence she lacks. Also, some theists, e.g., pantheists, think that we learn about a deity the same way that we learn about tables, namely by empirical evidence (Penalver 1997). Perhaps this reveals only that people mean different things when they use the term "deity," but if so, the prospects of identifying an epistemological marker for all religious beliefs are even less likely.

[43] There is vast literature on this subject, but one representative is by Richard Rorty (1986).

assumption, it seems that nonreligious moral beliefs are. As Larry Alexander points out, neither moral beliefs nor religious beliefs are empirically grounded the same way scientific beliefs are (Alexander 1993). While Alexander's claim is not universally accepted, many philosophers believe that what provides us reason to accept moral beliefs, e.g., moral sentiments, is not itself capable of further support (Hume 1978). If these philosophers are correct, then even if we can distinguish scientific beliefs from religious beliefs epistemologically, we cannot similarly distinguish moral beliefs and religious beliefs.

At the very least, these complexities reveal that epistemologically distinguishing religious beliefs depends upon resolving extremely controversial theological and epistemological questions. Thus, the epistemological distinction that scholars like Audi rely upon to conclude that we must "separate religion from law and public policy" is itself extremely contentious. Ironically, the theological and philosophical questions that must be resolved to maintain such a distinction are precisely the kind of questions that the religion clauses are designed to keep government from resolving.

What this shows is that an epistemological distinction cannot capture all religious beliefs. Religious beliefs are epistemologically too diverse. For instance, faith plays virtually no role in Zen Buddhism, but an enormous role in most Christian religions (Taliaferro 1998; Peterson 1991). One cannot identify something unique to religions by discerning distinctive inputs of religious beliefs. Thus, the epistemological method fails to satisfy the second criterion of adequacy for a definition: it produces definitions that are too narrow, too broad, or simply too contentious.

The Functional Method

Those scholars employing the functional method attempt to identify unique outputs of religious beliefs. According to the functional method, religious beliefs play a unique role in the lives of adherents. For example, James Donovan uses this method to identify religions by whether they, roughly, respond "to the existential concerns of the individual" by serving "the psychological function of alleviating death anxiety" (Donovan 1995, 29, 95). Another scholar who employs this method is Keith Yandell (1999):

> A religion proposes a *diagnosis* (an account of what it takes the basic problem facing human beings to be) and a *cure* (a way of permanently and desirably solving that problem): one basic problem shared by every human person and one fundamental solution that, however adapted to different cultures and cases, is essentially the same across the board. (17)

Those attempting to identify a unique role that religious belief systems play encounter problems similar to those that plague the content-based method. Again, Wittgenstein's discussion of the term "game" is informative. There is no *single* role that games play in our lives. Even if there were, there would be nongames that also play that role. The same is true of religions. For instance, why is alleviating death anxiety a religious role, whereas, presumably, alleviating stage fright is not? Religious beliefs can play either, or neither, role. Reading Epicurus provides a set of beliefs that alleviates death anxiety, but it is not thereby a religion. Also, identifying "one basic problem shared by every human person and one fundamental solution" is not unique to religions. Freudian psychology diagnoses a basic problem facing all humans and then proposes a cure, and yet Freudian psychology is no religion. There is no unique role that religions, or games, play in our lives. The functional method fails to satisfy the second criterion of

adequacy for a definition because the definitions it produces are either too narrow or too broad.

None of the three methods has identified a trait that all religions share and only religions possess. There is no single decomposition of the content of the term "religion" into simple constituents. It is too contentious whether (and unlikely that enough) religious beliefs are epistemologically distinctive. No distinctive role has been identified that all and only religious belief systems play. Thus, the uniqueness approach fails to provide an adequate definition of the term "religion" for the religion clauses. If we are going to define the term "religion" for the religion clauses, we need to do so in a way that does not rely upon the existence of such unique traits.

The Analogical Approach

Those employing the analogical approach, perhaps recognizing the failure of the uniqueness approach, do not attempt to identify traits unique to religions. Instead, they compare a belief system with belief systems from paradigmatic traditional religions to determine whether the belief system in question has more in common with religious belief systems than with nonreligious ones. For example, Eduardo Penalver identifies religions by comparing belief systems with one theistic religion, one nontheistic religion, and one pantheistic religion (Penalver 1997). Similarly, George Freeman identifies something as a religion if it "is more likely to promote a paradigmatic religious belief system than a paradigmatic irreligious one" (Freeman 1983, 1563). Also, courts have adopted this "definition by analogy" approach.[44]

[44] *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 & n.12 (3d Cir. 1981) (listing other courts adopting this approach).

There is an initial problem those employing the analogical approach must address: they must identify which similarities are the relevant ones for comparison. This problem, however, does not seem difficult to overcome. After all, native English speakers seem to have no trouble identifying new religions as such. For instance, native speakers have come to identify Mormonism as a religion even though Joseph Smith founded it after the term "religion" already had a meaning, and they likely did so because Mormonism resembles belief systems accepted as religions in certain ways: it has a "belief in God; a comprehensive view of the world . . . belief in some form of afterlife; communication with God . . . the use of sacred texts," etc. (Greenawalt 1984, 767). Even though, as we have seen, none of these traits are possessed by all and only religions, they are *relevant* to identifying religions; otherwise they never would have been plausible candidates. Thus, it seems that we already make accurate assumptions about which similarities are relevant when we compare a belief system with paradigm examples of religions and nonreligions.

Even after we determine the relevant similarities, however, the analogical approach cannot help us when the subject matter requires precision. To illustrate, consider the following example, again involving the term "game." Suppose a group of schoolchildren race to get their math problems done first whenever they are given an assignment. They do not agree to do this, nor do they receive an explicit reward for finishing first. Is this a game? Perhaps we would call it a game, and perhaps we would (likely unconsciously) analogize with paradigm examples of games to make our decision, just as the analogical approach suggests. Someone might even refer to it as "the schoolchildren's little game." But what follows from this?

Assume that the school would receive a $100,000 grant if the schoolchildren's attempts to finish first really constitute a game. Ordinarily it would not matter whether it really is a game. It is enough that it is not *wrong* to call it a game. But the fact that it is not wrong to call it a game does not entail that it is wrong *not* to call it a game. In other words, even though someone is not abusing the language by calling it a "game," someone who refuses to call it a "game" also is not abusing the language. There simply is no clear answer in such circumstances. The fact that someone is not incorrect to call it "the schoolchildren's little game" decides nothing about the funding.

When we analogize with paradigm examples of games, the most we can conclude is that this is a borderline case: the schoolchildren's attempts to finish first share relevant similarities with some games, but not others. Thus, contrary to Kent Greenawalt's hope, the analogical approach itself cannot "help us resolve borderline questions and work toward clarification of the conditions required for the application of the concept" (Greenawalt 1984, 766). When the situation requires extraordinary precision, the analogical approach provides no guidance in resolving borderline cases, even if we could identify all of the similarities relevant for comparison.

It requires precision for us to determine whether something satisfies the definition of the term "religion" when interpreting the religion clauses. After all, native English speakers do not seriously disagree about whether Catholicism is a religion. Instead, people disagree about whether borderline cases, e.g., Shintoism, are religions (Noss 1999; Markham 1996). As we ordinarily use the term "religion," it is not wrong either to call Shintoism a religion or to refuse to call it a religion in certain contexts. The analogical approach does not help to determine whether borderline cases such as Shintoism *really*

are religions. The analogical approach does not lead to counterintuitive results like the other approaches we have considered, but it also cannot help to resolve "inconsistent and contradictory decisions." The analogical approach fails to satisfy the first criterion of adequacy for a definition because it cannot assist courts in deciding hard cases.

At this point, we can conclude that the analogical approach cannot supply the requisite precision to decide borderline cases. However, we also can understand why. Where extraordinary precision is needed, the intuitions of native speakers about which things particular terms refer to (semantic intuitions) are not helpful. After all, it is differences in our semantic intuitions that make borderline cases borderline in the first place. For example, native speakers' semantic intuitions are not uniform regarding whether the term "religion" properly refers to Shintoism. It is this same lack of uniformity that makes borderline cases difficult for courts. Our semantic intuitions cannot help to resolve difficult cases because they are what make the cases difficult in the first place. Thus, a theory that merely describes or explains our semantic intuitions cannot help to resolve difficult religion clause cases.[45] The confidence that courts and scholars have that the analogical approach can identify religions for interpretation of the religion clauses is simply misplaced.

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[45] It is worth noting that this criticism of the analogical approach does not depend upon adopting a traditional theory of meaning and reference whereby terms refer via descriptions native speakers associate with them. An alternative theory of reference, developed by Saul Kripke and Hilary Putnam, whereby terms refer not via descriptions native speakers associate with them but because of facts external to native speakers, does not change the result (Kripke 1980; Putnam 1975). While it is plausible (but extremely controversial) that natural-kind terms such as "water" and "gold" do not refer to objects that satisfy descriptions native speakers associate with the terms—such as "wet" and "liquid" or "hard" and "yellowish"—but rather are rigidly designated by facts external to native speakers—such as atomic structure—it is not at all clear how terms like "religion" are similarly rigidly designated, despite the efforts of some scholars to apply this theory of reference to moral and legal terms (Stavropoulos 1996). Unlike with science (and as we have seen) native English speakers disagree about what "facts" are relevant to fixing the referents of the term "religion" as well as about who are the "experts" (analogous to scientists) needed to provide the authoritative opinions regarding the proper referents of the term "religion." Thus, this alternative theory of reference cannot save the analogical approach.

None of the three approaches we have examined provides an adequate definition of the term "religion" for the religion clauses. Thus, the Court's inability to provide a definition of the term "religion" in the First Amendment is understandable. But without such a definition, how can we avoid the "inconsistent and contradictory" religion clause decisions that many scholars attribute to the lack of such a definition? In other words, while I may have explained why the Court has not provided a definition of the term "religion," I also seem to have explained why religion clause jurisprudence will continue to produce "inconsistent and contradictory decisions." As I will argue next, however, the lack of a single, correct definition of the term "religion" does not doom religion clause jurisprudence.

The Religion Clauses Do Not Require a Unique Definition

The primary cause of "inconsistent and contradictory" religion clause decisions is not the fact that there is no uniquely correct definition of the term "religion" as it occurs in ordinary English. If it were, then we should expect many other clauses to suffer from the same problem. For instance, the term "life" in the due process clauses is just as imprecise.[46] Deciding whether a fetus or a brain-dead patient qualifies as "living" requires one to take a stance on contentious moral questions. Definitions of the term "life" suffer from the same imprecision as definitions of the term "religion."

The same is true for the term "executive."[47] Whether a particular action taken by the EPA is executive or legislative in nature depends upon whether the action is law-making or law-enforcing. But where one draws the boundary between the two depends

[46] U.S. Const. amends. 5, 14.
[47] U.S. Const. art. II, sec. 1.

upon one's political theory. Definitions of the term "executive" also suffer from the same imprecision as definitions of the term "religion."

Finally, consider the term "press."[48] Does producing a web page or a community newsletter qualify as a press? The Court has refrained from defining the term "press" likely because such a definition would create more difficult cases than it would resolve. Whatever definition the Court provides, people would manipulate their activities to qualify under the definition; it seems much wiser to focus upon, e.g., content and viewpoint. It would be just as counterproductive for the Court to attempt to provide a single definition of the term "religion" as it would be to provide a single definition of the term "press." The stakes for qualifying as a religion simply are too high. Not only does it seem unlikely that the Court could provide uniquely correct definitions of the terms "religion" and "press," but it also seems imprudent for them to do so.

The fact that the term "religion" has no uniquely correct definition does not create a *special* problem for the religion clauses. Thus, there is no reason to think that inconsistency in religion clause decisions is primarily due to the lack of an adequate definition of the term "religion." Yet how can courts properly apply the religion clauses without such a definition? Larry Alexander argues that because "any attempt to draw a line between secular and sectarian . . . will be impossible to defend theoretically . . . the First Amendment's religion clauses cannot be applied" (Alexander 1993, 793). Although any line between secular and sectarian seems theoretically indefensible, this does not mean that the religion clauses cannot be applied. If a single definition were needed, then perhaps there could be no consistent religion clause jurisprudence. But, as I will

[48] U.S. Const. amend. 1.

illustrate, the religion clauses do not, and could not, require a single definition of the term "religion" in all legal contexts.

The Contextual Nature of What Qualifies as a Religion

Even if our semantic intuitions would endorse a single definition of the term "religion," we should not employ such a definition for the religion clauses. A single definition will not work because what qualifies as religion for legal purposes differs across differing legal contexts.

There are many roles that religion plays in people's lives. A religion can be "an institution . . . an ideology or worldview . . . a set of personal loyalties . . . locus of community, akin to family ties . . . an aspect of identity," and it can provide "answers to questions of ultimate reality, and offers a connection to the transcendent" (McConnell 2000, 42). These different aspects of religion are (and should be) important in different legal contexts. As the legal context differs, what the term "religion" in the religion clauses refers to does not remain constant. To illustrate, consider the following three examples.

First, in some legal contexts, the legally relevant aspects of religion are religion as a set of personal loyalties, an ideology, and a facet of personal identity. To illustrate, consider two cases, *United States v. Seeger*[49] and *Welsh v. United States*,[50] interpreting the Universal Military Training and Service Act, which exempted from military service anyone who "by reason of religious training and belief, is conscientiously opposed to

[49] *Seeger*, 380 U.S. 163 (1965).
[50] *Welsh*, 398 U.S. 333 (1970).

participation in war in any form."[51] Congress expressly excluded objections based upon "political, sociological, or philosophical views, or a merely personal moral code."[52] Thus, for the Court to find that Seeger and Welsh qualified for the exemption, it had to conclude that the objections of Seeger and Welsh were religious.

In *Welsh*, the Court found that for one's beliefs to qualify as religious, it is enough that the beliefs are held "with the strength of more traditional religious convictions."[53] Similarly in *Seeger*, the Court proposed the following test to determine whether one qualifies for the exemption: "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[54] Those who "admittedly qualify" do so by having a religiously informed conscience, which focuses upon religion as a set of personal loyalties, an ideology, and a facet of personal identity.

The institutional aspect of religions is not directly relevant to what qualifies as religion in this context. Recognizing this, the Court exempted Welsh and Seeger even though Seeger was likely an agnostic and Welsh's beliefs were only "religious in the ethical sense of the word," whatever that means.[55] The Court recognized that the objections of Welsh and Seeger similarly implicated a set of personal loyalties, an ideology, and a facet of personal identity. Whether these cases ultimately were decided correctly, we can see that the fact that one's religion is organized, a locus of community,

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[51] *Seeger*, 380 U.S. at 164. Even though the Court is interpreting a statute in these cases, scholars and other courts generally agree that the Court's discussion is relevant to the constitutional definition of the term "religion." See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (stating that "[a]s a matter of logic and language, if the Court is willing to read 'religious belief' so as to comprehend beliefs based upon pantheistic and ethical views, it might be presumed to favor a similar inclusive definition of 'religion' as that term appears in the first amendment").
[52] *Seeger*, 380 U.S. at 165.
[53] *Welsh*, 398 U.S. at 340.
[54] *Seeger*, 380 U.S. at 176.
[55] *Welsh*, 398 U.S. at 341.

or practiced by large segments of the population is not directly relevant to whether one's objection qualifies as religious in this context.

Second, in some legal contexts, the legally relevant aspects of religion are religion as an institution exhibiting and embodying a certain worldview. To illustrate, consider a case where a government regulation threatens religious institutional autonomy, e.g., a new law applies existing antidiscrimination laws to religions such that the Catholic Church is required to ordain and 'hire' female priests. What aspects of religion would be relevant when challenging such a law? If enforced, such a law would threaten the institutional integrity of certain religions. Thus, a religion must at least be organized to qualify for protection in this context. Businesses owned by Seeger and Welsh, no matter how deeply they held their views, would not be exempt from such a law on religious grounds. Even with these first two brief examples, we can see that what qualifies as religion differs in differing legal contexts.

Third, in some legal contexts, the legally relevant aspects are all of those relevant in the first two contexts. To illustrate, consider the priest-penitent privilege. In 1843, a court held that the privilege must be recognized on grounds very similar to those relevant in the conscientious objector context: to fail to recognize the privilege would force a priest to violate either an ecclesiastical oath or a judicial oath.[56] The court reasoned that to avoid forcing a priest to choose between perjury and contempt, the law must exempt the priest from ever having to appear.[57] Religion was even described as a deeply personal "affair between God and man."[58]

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[56] *People v. Phillips*, reprinted in 1 Western L.J. (1843).
[57] *Id.*
[58] *Id.*

Yet the court also stated that in this context it "is essential to the free exercise of a religion, that its ordinances should be administered – that its ceremonies as well as its essentials should be protected."[59] The practices of the religion as an organization, along with the expectations of its members regarding its religious practices, are important in this context. The institutional autonomy of the organization is at issue, just as it was in the context involving exemptions from antidiscrimination laws. In the priest-penitent context, all of the aspects of religion that were relevant in the first two examples are relevant. Thus, because more must be shown before an entity can qualify for protection in the priest-penitent context, fewer entities should qualify in this context than in either of the first two legal contexts.

However such cases should be decided, we can see that the same definition of the term "religion" will not work in all three legal contexts because what qualifies as religion varies as the legal context varies. As a result, even if there were a single definition of the term "religion" as it occurs in ordinary English, it would not help us interpret and apply the religion clauses. Thus, it cannot be the lack of an adequate definition of the term "religion" that explains "inconsistent and contradictory" religion clause decisions.

One may object that I have confused two different things: (i) determining what qualifies as religion in any given legal context and (ii) defining the term "religion." After all, the correct definition simply could be very broad in all contexts, and yet not all things that are religions would qualify in all legal contexts. For example, political speech does not cease to be speech just because it is not protected from government censure in certain forums. If I want to criticize the government on a public street corner, the Free Speech Clause generally prohibits government from silencing me, but if I want to criticize the

[59] *Id.*

government on a military base, the Free Speech Clause is less likely to prohibit the government from silencing me.[60] If my speech is not protected from government censure in the second context, it is not because my criticisms cease to be speech. In both cases, my criticisms qualify as speech, but yet what qualifies for *protection* varies as the legal context varies. Perhaps similarly there is a single definition of the term "religion," but what *qualifies for protection* under the Free Exercise Clause or *raises concerns* under the Establishment Clause is what should vary with the legal context.

This objection makes an important point that illustrates the limited usefulness of concepts and definitions in constitutional interpretation as well as a dilemma for those who claim that an adequate definition of the term "religion" will resolve "inconsistent and contradictory decisions." Either the definition of the term "religion" must incorporate the legal context or it cannot help us to determine what qualifies as religion in the religion clauses because it is too broad. Either way, a definition of the term "religion" as it occurs in ordinary English will not help us to interpret and apply the religion clauses. Thus, it was a mistake for so many legal scholars to believe that providing a definition of the term "religion" could help resolve the "inconsistent and contradictory decisions" in the first place. The legal context matters, and, as I will argue next, recognizing how it matters helps to dissolve a certain interpretative puzzle involving the religion clauses.

The Tension Between the Clauses

Recognizing that what qualifies as religion in the religion clauses varies with the legal context sheds new light upon the so-called "tension between the clauses." To illustrate, consider the puzzle that emerges when we combine the following claims:

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[60] *Brown v. Palmer*, 944 F.2d 732 (10th Cir. 1991).

1. The Free Exercise Clause singles out religion for protection.
2. The Establishment Clause singles out religion as ineligible for some government benefits.
3. Because the same term "religion" is used in both the Establishment Clause and the Free Exercise Clause, what qualifies as religion is the same for both clauses.
4. Some Free Exercise contexts require a broad "conscientious objector" definition.
5. If what qualifies as religion is the same in all legal contexts, then the broad "conscientious objector" definition applies in all Free Exercise contexts.
6. If the broad "conscientious objector" definition applies in all Establishment Clause contexts, then too much government conduct will be forbidden.

Scholars have attempted to solve this puzzle in different ways. Before considering possible solutions, however, notice that denying 2 only makes matters worse. It simply is not plausible to interpret the Establishment Clause as forbidding the government from benefiting nonreligious individuals or institutions. Thus, it is not a viable solution to the puzzle to deny 2. Denying any of the others, however, is a viable option.

The Free Exercise Clause Singles Out Religion for Protection

One way to solve the puzzle is to deny 1, or to deny that the Free Exercise Clause singles out religion for protection. Christopher Eisgruber and Lawrence Sager provide the best example of those scholars who deny 1. For Eisgruber and Sager, what "properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value; and what is called for, in turn, is protection against discrimination, not privilege against legitimate governmental concerns"

(Eisgruber 1994, 1248). Eisgruber and Sager replace "the paradigm of privilege with that of protection" (Eisgruber 1994, 1248). Religion is special in two ways: "religious activities are more important than matters of fashion or recreation . . . and people are especially likely to undervalue, or persecute, religious activities different from their own" (Eisgruber 1994, 1271).

From this, Eisgruber and Sager advocate a principle of Equal Regard, which "requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally" (Eisgruber 1994, 1283). To qualify for protection, a claimant must show "(a) that a general law significantly interferes with some actions motivated by her deep religious commitments; and (b) that had her deep, religiously inspired concerns been treated with the same regard as that enjoyed by the fundamental concerns of citizens generally, she would have been exempted from the reach of the general law" (Eisgruber 1994, 1285). Government can accommodate religion only if it similarly accommodates, or it similarly would accommodate, nonreligion. In this way, Eisgruber and Sager deny 1, or they deny that the Free Exercise Clause singles out religion for protection.

There are at least three problems with Eisgruber and Sager's account. The first problem is obvious: the text of the First Amendment explicitly singles out religion for protection. To require that nonreligion be protected along with religion simply ignores the text of the Constitution itself.

Second, as Michael McConnell points out, while it may be arguable whether the religion clauses *require* religious accommodations, it is clear that the religion clauses at least *permit* religious accommodations (McConnell 2000). McConnell explains that

among the Framers, some "believed that religious concerns should be given constitutional protection, some thought protection for religious concerns was desirable but should be left to legislative discretion, and some opposed exemptions altogether; however, no member of the First Congress expressed the view that it was improper to extend protection to 'religious sentiments'" (McConnell 2000, 14).

Third, Eisgruber and Sager's principle of Equal Regard is incoherent. For instance, "concerns of citizens generally" is not a standard to which a court can compare the treatment of religions. "Some secular interests are strong and some are weak. Religious interests cannot be treated equally with respect to both concepts" (McConnell 2000, 35). Also, often there will be no secular exemptions with which a court can compare the religious exemption. In such cases, the "inquiry may proceed on a hypothetical basis, examining close analogies to form an educated guess about how the government would respond if faced with other powerful claims for exemption" (McConnell 2000, 36). It is exceedingly difficult to discern the legislative intent for enacted laws, and thus, such a hypothetical inquiry would provide little, if any, guidance. Thus, Eisgruber and Sager's account not only runs counter to the text and history of the Free Exercise Clause, but it also ultimately fails to provide courts any standard by which to apply the Free Exercise Clause.

What Qualifies as Religion Is the Same for Both Clauses

Another way to solve the puzzle is to deny 3, or deny that the definition of the term "religion" is the same in both clauses. Laurence Tribe once proposed defining religion broadly for the Free Exercise Clause and narrowly for the Establishment Clause (Tribe 1978). He recognized that denying 3 would allow an expansive definition for the

Free Exercise Clause to account for new "legitimate" practices, but avoid an expansive definition for the Establishment Clause "lest all 'humane' programs of government be deemed . . . suspect" (Tribe 1978, 827-28).

Perhaps denying 3 would be an option if the term "religion" appeared once in each clause, but both clauses share one word. They read, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[61] Thus, Tribe's reading simply ignores the text. Also, as we have seen, even a single definition for each clause fails to account for the fact that what qualifies as religion varies with the legal context. For both reasons, denying 3 is an inadequate solution to the puzzle.

Some Free Exercise Contexts Require a Broad Definition

Another way to solve the puzzle is to deny 4, or to deny that a broad definition, like the "conscientious objector" definition, is ever needed. The originalist definition that we considered in Part II.A. entails such a result. Yet as previously discussed, the traditional originalist definition is too narrow to capture everything that should qualify for protection under the Free Exercise Clause.[62] A narrow definition also would create

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[61] U.S. Const. amend. 1.

[62] Michael McConnell has argued that the term "religion," as it was used in the religion clauses, cannot extend to matters of conscience. McConnell's evidence is that the framers "seriously considered enacting constitutional protection for 'conscience' . . . and deliberately adopted the term 'religion' instead" (McConnell 2000, 12). This "historical fact casts doubt on the suggestion . . . that the constitutional term 'religion' should be broadly interpreted in order to encompass secular claims of conscience," and thus such a broad interpretation "would constitute an amendment, not an interpretation, of the First Amendment, and one that the Framers specifically considered, debated, and ultimately rejected" (McConnell 2000, 12).

If the issue were whether the term "religion" extends to matters of conscience in *all* legal contexts, then the history and text likely entail that "religion" cannot extend to matters of conscience. In other words, if the religion clauses required a single definition, then McConnell would be correct. However, a single definition is not helpful, let alone required, then the "conscientious objector" definition is not required in all legal contexts. Thus, evidence that the Framers rejected the term "conscience" for the term "religion" does not necessarily preclude the "conscientious objector" definition in some contexts.

To see why, consider the following two scenarios where I struggle over which of two words to choose. First, I understand what both words express and decide that one captures what I want while the other does

Establishment Clause problems. For example, if neither Santeriaism nor Shintoism qualifies as a religion, then the Establishment Clause would not forbid government from directly and deliberately subsidizing or advocating them. When we deny 4 and opt for a more narrow definition of the term "religion" in all legal contexts, we solve the puzzle, but produce unacceptable, counterintuitive legal results.

A Broad Definition Would Forbid Too Much

Another way to solve the puzzle is to deny 6, or to deny that a broad "conscientious objector" definition would cause the Establishment Clause to forbid too much government conduct. Andrew Koppelman takes this approach. Koppelman begins with what he takes to be a constitutional axiom: government may not declare religious truth (Koppelman 2002). From this axiom, Koppelman infers that all laws must have a secular purpose (Koppelman 2002). Thus, whether government may accommodate religion depends upon whether government can do so while maintaining a secular purpose.

For Koppelman, a law has a secular purpose if it fails to have a "preference more specific than support for religion in general" (Koppelman 2002, 90), where "religion in general" refers "to the activity of pursuing ultimate questions about the meaning of human existence" (Koppelman 2002, 90). A law has a secular purpose if the social meaning of the law would be agreed upon by "nearly any member of society," which turns "on the range of meanings that natives of the culture can reasonably ascribe to the

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not. Second, I understand what both words express and notice that neither fully captures what I want. In the second scenario, I choose the word that *best* captures what I wish to express, not the word that *fully* captures what I wish to express. This means that by choosing one, I do not thereby intend to reject the other in all contexts. Thus, if the framers struggled (or were understood to have struggled) over which word best identified the type of entities about which they were concerned, the framer's debate simply demonstrates that most of the time the religion clauses do not extend to mere matters of conscience.

government action in question" given the "context in which the law was enacted" (Koppelman 2002, 115).

Koppelman characterizes the problem of defining the term "religion" as one of finding the proper "level of abstraction" (Koppelman 2002, 129). Koppelman defines "religion" at the most general level and concludes that government "may coherently single out [religion in general] for special treatment" (Koppelman 2002, 133). Rather than arguing that nonreligion must be accommodated along with religion, Koppelman argues that religion may be singled out for accommodation, but only if religion is defined as broadly as possible. In this way, Koppelman achieves nearly the same practical results as Eisgruber and Sager while seemingly respecting 1.

Koppelman's account ultimately fails. First, it is unclear how to determine when "nearly any member of society" considers a law to have a secular purpose. Koppelman explains that the requirement depends upon "the range of meanings that natives of the culture can reasonably ascribe to the government action in question" given the "context in which the law was enacted" (Koppelman 2002, 115, 147). But what are these? Do tax exemptions for religious organizations, recognition of the priest-penitent privilege, school vouchers, the phrase "under God" in the Pledge of Allegiance, or exemptions from antidiscrimination laws for religious organizations have the requisite social meaning?

Koppelman suggests an "authoritative way to resolve disputes about social meaning": courts should use data similar to that gathered in trademark disputes (Diamone 2001, 736-60). If enough people agree both that the government is "sponsoring or promoting" religion and that the sponsorship or promotion "conveys a message that the government is endorsing the particular religious view," then the

government's action lacks a secular purpose (Diamone 2001, 749-50). The problem with this is that one's opinions about whether two advertisements are similar enough to cause confusion generally do not depend upon one's ideology, whereas one's opinions about whether a statute has a religious social meaning do. There is reasonable disagreement over whether the phrase "under God" in the Pledge of Allegiance "conveys a message that the government is endorsing a particular religious view."[63] How do we determine whether it does?

First, we would need to know what the proper question is to ask native speakers. Do we ask whether the phrase "under God" in the Pledge of Allegiance has a secular purpose, whether the Pledge of Allegiance as a whole has a secular purpose, or whether, overall, public schools have a secular purpose? Even assuming that the proper question is the first, public opinion regarding whether the phrase "under God" in the Pledge of Allegiance has a secular purpose is unlikely to be the same in, e.g., New York City and Salt Lake City. It is unlikely that there is a single social meaning that "enough" Americans ascribe to any given law concerning religion, especially contentious ones, which, after all, are those most likely to be litigated.

Perhaps more important, sometimes a narrower set of entities than what qualifies as religion in general requires accommodation. If the government must accommodate or protect "the activity of pursuing ultimate questions about the meaning of existence," then every philosophy department has the same status as religions. Thus, for example, every private school's philosophy department must be treated same as the Catholic Church. In the end, Koppelman's account fails to single out religion at all, and thereby suffers from the same defects as Eisgruber and Sager's account.

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[63] *Newdow v. United States*, 292 F.3d 597 (9th Cir. 2002).

What Qualifies as Religion Differs in Differing Legal Contexts

The best solution to the puzzle is to deny 5, or to deny that what qualifies as a religion is the same across all legal contexts. All other possible solutions to the puzzle presuppose that a single definition of the term "religion" is required, or at least that a single definition for each clause is required. Yet as we have seen, what qualifies as religion varies as the legal context varies. Thus, the fact that the priest-penitent privilege context requires a narrow definition does not entail that conscientious objectors falling outside such a narrow definition do not enjoy protection in other legal contexts.

There are at least three benefits to understanding that what qualifies as religion in the religion clauses differs in differing legal contexts. First, we will cease the quest for a single definition of the term "religion" to assist courts in interpreting the religion clauses. We will come to recognize not only that there is no single definition, but also that even if there were, it would not be adequate in all legal contexts.

Second, we will cease attempting to resolve tension between the clauses that does not exist. For example, recognizing that a narrow definition is needed in the priest-penitent context will no longer lead us to conclude that conscientious objections, similar to those made by Seeger and Welsh, should never qualify as religious, or that groups falling outside such a narrow definition never implicate the Establishment Clause. As a result, scholars should no longer attempt to solve such illusory problems. Appreciating the contextual nature of what qualifies as religion may not dissolve all tension between the two clauses, but it will keep us from developing solutions to problems generated by a false assumption—that what qualifies as religion is the same in all legal contexts.

Third, we will recognize that we can legitimately draw upon interpretations of many other clauses in the Constitution to interpret the religion clauses. For instance, where religious expression is at issue, then the natural place to find relevant parallels is the Free Speech Clause.[64] Where discrimination against individuals based upon membership in a religion is at issue, then the natural place to find relevant parallels is the Equal Protection Clause.[65] Pointing out that religion does not always function like speech, race, or an assembly in some contexts, however, should not prevent courts from drawing analogies to these in other contexts. Perhaps the best way to view the religion clauses is as extensions of other clauses into the religious context.[66]

Noticing that what qualifies as religion in the religion clauses differs in differing legal contexts sheds new light upon religion clause scholarship. While we still need a way to identify religions in specific contexts, we can at least eliminate methods that are fundamentally misguided, and in turn, understand that the so-called "tension between the clauses" is a problem not worthy of the vast attention that it has received.

Conclusion

There is no single definition of the term "religion" as it occurs in ordinary English, at least not one that can help interpret and apply of the religion clauses. The reason for this is simple—what qualifies as religion differs across differing legal contexts. A single definition will not work in all legal contexts, and thus, courts and scholars should stop attempting to provide a definition of the term "religion" that does.

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[64] *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) is an example of the Court treating religious freedom of expression as a kind of expression protected under the Free Speech Clause.
[65] *Employment Division v. Smith*, 494 U.S. 872 (1990), moves free exercise doctrine closer to equal protection doctrine, as articulated in *Washington v. Davis*, 426 U.S. 229 (1976).
[66] For a defense of this reading see McConnell (2000).

By recognizing that what qualifies as religion varies as the legal context varies, we can see that the vast attention given to the so-called "tension between the clauses" is misplaced. Scholars should discontinue their search for ways to reduce tension that presupposes a unique definition of "religion" applies in all legal contexts. The better approach is to view the religion clauses as an extension of other clauses—Free Speech Clause, Equal Protection Clause, etc.—into the religious context. The religion clauses forbid certain types of favoritism as well as certain types of discrimination and exclusion. The difficult issue left unresolved is determining when the religion clauses forbid these things, but at least we should no longer be sidetracked by insignificant definitional problems and illusory puzzles.

The upshot is that even if the Constitution is best understood as incorporating concepts, instead of conceptions, semantics provides little guidance for constitutional interpretation. In Chapter 3, we will see how practical considerations make concepts unhelpful.

CHAPTER 3[1]

SCRUTINIZING COMMERCIAL SPEECH

Introduction

The chapter illustrates why placing too much emphasis on concepts and definitions ultimately is unhelpful in the task of interpreting the Constitution. I will examine the U.S. Supreme Court's failed attempt to distinguish between commercial speech and noncommercial speech for purposes of interpreting the Free Speech Clause. Its failure illustrates why practical considerations, coupled with the imprecision of concepts and definitions, suggests that those interpreting the Constitution should focus less on definitions.

On the surface, commercial speech continues to be distinguished from noncommercial speech under the First Amendment. However, a careful analysis of the development of commercial speech doctrine reveals that formally abandoning the distinction is merely the natural extension of, if not entailed by, commercial speech jurisprudence already in place. It is a distinction without a constitutional difference. It should be, and for the most part has been, formally abandoned.

[1] Reprinted with kind permission of the George Mason University Civil Rights Law Journal.

The Instability of Commercial Speech Doctrine

The text of the First Amendment does not distinguish between commercial and noncommercial speech, but rather plainly states that "Congress shall make no law . . . abridging the freedom of speech."[2] Explaining the text to Congress, James Madison stated, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments."[3] Despite the broad scope of the term "speech," the United States Supreme Court's holding in *Valentine v. Chrestensen*,[4] that commercial speech motivated by a desire to make a profit does not enjoy protection under the First Amendment, controlled commercial speech jurisprudence for more than thirty years.[5] During this period, it became apparent that what seems like a "common sense" distinction between commercial speech and noncommercial speech is extremely difficult to draw in a constitutionally relevant manner.[6]

For example, in *New York Times v. Sullivan*,[7] the Court held that an advertisement published in the newspaper was not commercial speech because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern," despite that fact that the advertisement sought monetary contributions.[8] The problems that immediately appear from categorically distinguishing commercial speech are that (i) speakers are rarely motivated by a

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[2] U.S. Const. amend. I.
[3] James Madison Speech to Congress - June 8, 1789.
[4] 316 U.S. 52 (1942).
[5] *See Breard v. Alexandria*, 341 U.S. 622 (1951); *Pittsburgh Press v. Human Relations Commission*, 413 U.S. 376 (1973).
[6] *See Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting).
[7] 376 U.S. 254 (1964).
[8] *Id*. at 266.

monolithic desire for profit and (ii) it is difficult to determine when speech is *sufficiently* motivated by a desire for profit to warrant a different level of protection.

For this reason, at times the Court has struggled to classify speech that is motivated by a desire to make a profit as noncommercial so that it could protect such speech.[9] At other times, the Court has held that communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public interest."[10] Indeed, as the Court has recognized, "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."[11] Because whether speech is commercial in nature is a matter of degree, it is unsurprising that a categorical distinction between commercial and noncommercial speech is difficult to draw.

The distinction is also difficult to justify. Even if it were a relatively simple task to identify speech sufficiently motivated by a desire for profit, it is not obvious that such a motive is relevant to the determination of First Amendment protection.[12] In fact, as a review of the relevant case law reveals, the distinction between commercial and noncommercial speech does not in itself capture a constitutionally relevant difference.

Eleven years after *Sullivan*, the Court in *Bigelow v. Virginia*[13] was poised to disregard the distinction between commercial and noncommercial speech altogether

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[9] See id.; see also *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (distinguishing on the ground that "the advertisement conveyed information of potential interest and value to a diverse audience").
[10] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983).
[11] *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).
[12] In *Board of Trustees of the State University of N.Y. v. Fox*, 492 U.S. 469, 482 (1989), the Court alternatively defined "commercial speech" as speech that proposes a commercial transaction rather than merely speech motivated by profit. However, to the extent these two definitions differ, it is difficult to see a relevant difference for constitutional purposes. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (holding that speech that does no more than propose a commercial transaction deserves First Amendment protection).
[13] 421 U.S. 809, 818 (1975) (reversing a conviction for violating a statute that made publication to encourage or promote the processing of an abortion a misdemeanor).

when it stated, "speech is not stripped of First Amendment protection merely because it appears in [advertising] form."[14] The Court recognized that at least *some* speech—in particular advertising for abortion procedures by for-profit organizations—although sufficiently motivated by a desire to make a profit, nonetheless deserves protection equal to noncommercial speech.[15] However, rather than abandoning the distinction between commercial and noncommercial speech altogether, the Court instead distinguished *Bigelow* from prior cases on its facts.[16] Thus, after *Bigelow*, courts still had to choose between giving commercial speech full First Amendment protection and giving commercial speech no protection at all. Predictably the definition of "commercial speech" alone, which the Court had recognized is a matter of degree, could not sustain this dichotomy.

The Court's solution was to provide limited First Amendment protection for nearly all commercial speech, which lowered the stakes for determining whether speech was sufficiently noncommercial to warrant full First Amendment protection.[17] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[18] the Court finally afforded First Amendment protection for commercial speech that does "no more than propose a commercial transaction."[19] In fact, the Court consciously characterized the speech as commercial, going so far as to describe the restricted speech as follows: "I will sell you the X prescription drug at the Y price."[20] The Court had finally overruled *Valentine*, and in doing so recognized that (i) commercial speech cannot deserve less

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[14] *Id*.
[15] *Id.* at 825.
[16] *Id.* at 821-25.
[17] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).
[18] 425 U.S. 748 (1976).
[19] *Id*. at 762.
[20] *Id*.

protection because its content is a commercial subject, (ii) consumer interest in receiving commercial speech is as great as hearing political debates, and (iii) the free flow of commercial ideas is indispensable.[21]

Nonetheless, the Court stopped short of affording commercial speech full First Amendment protection and continued to distinguish it from noncommercial speech.[22] Instead, the Court provided the following justification for maintaining the distinction: "The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."[23] In addition, "commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."[24] For twenty years after *Virginia State Board*, the Court simply accepted that commercial speech deserved less protection without argument, usually by referring to the distinction between commercial and noncommercial speech as one of "common sense."[25]

Despite the Court's reference to common sense, it is difficult to understand how the reasoning in *Virginia State Board* justifies recognizing less protection for commercial speech categorically. Neither verifiability nor durability is relevant to First Amendment

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[21] *Id*. at 761, 763, 765.
[22] *Id*. at 772, n.24.
[23] *Id.*
[24] *Id.*
[25] *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 498-99 (1996); *Rubin v. Coors Brewing Co*., 514 U.S. 476, 482 (1995); *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 349 (1986) (Brennan, J., dissenting); *Bolder*, 463 U.S. at 64; *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562-63 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

protection in any other area, and it is difficult to see why these characteristics are relevant to affording commercial speech less protection as a category of speech. Those who express the view that the Holocaust never occurred are espousing a view more open to verification than those who claim that expanding the welfare state will result in a more just society. However, greater verifiability does not doom the former view to less protection under the First Amendment. Similarly, durability is not relevant to First Amendment protection. Mainstream political speech is much more durable than political speech on the fringes, but the latter does not *thereby* receive greater First Amendment protection. Even if verifiability and durability were constitutionally relevant, however, the category of speech that would deserve less protection would be speech shown to be more verifiable and durable. Commercial speech, which does not always possess these characteristics, would not deserve less protection as a category of speech.

Recognizing the instability of distinguishing commercial speech as a category, the Court in recent years has questioned the reasoning in *Virginia State Board.* In *44 Liquormart, Inc. v. Rhode Island*, Justice Stevens questioned the justification for the distinction between commercial and noncommercial speech.[26] In a section formally joined by Justices Kennedy and Ginsburg, Justice Stevens stated that "[r]egulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages."[27] Thus, "neither the 'greater objectivity' nor the 'greater hardiness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference."[28]

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[26] *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996).
[27] *Id.*
[28] *Id.*

In *44 Liquormart*, Justice Thomas also rejected the *Virginia State Board* reasoning, but he went even further, stating that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."[29] In addition, Justice Scalia, joined by Justice O'Conner, recognized that such reasoning had "nothing more than a policy intuition to support it."[30] Justice Scalia made this observation even though he was only willing to concur in the result reached by Justice Stevens because the parties had not sufficiently briefed the issue of whether the Court should formally abandon the distinction.[31] It is significant, however, that a majority of the Court in *44 Liquormart* recognized the inadequacy of the Court's traditional justification of the constitutional distinction between commercial and noncommercial speech.

Justice Thomas would have further held that any regulation that merely protects consumers by keeping them ignorant of commercial speech is *per se* illegitimate.[32] In response, Justice Stevens argued that "protecting consumers from 'commercial harms'" can be a sufficient reason for greater regulation of commercial speech.[33] But this reason for distinguishing commercial speech does not justify submitting regulations of commercial speech to less scrutiny; rather, it simply allows, in contrast to Justice Thomas's position, protecting consumers potentially to qualify as a compelling governmental interest for restricting speech. Justice Stevens' reasoning also accounts for the Court's previous intuition that government has a greater interest in regulating speech that is more verifiable—society has little interest in protecting the flow of demonstrably

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[29] *Id*. at 522 (Thomas, J., concurring).
[30] *Id*. at 517 (Scalia, J., concurring).
[31] *Id*. at 517 (Scalia, J., concurring).
[32] *Id*. at 518 (Thomas, J., concurring).
[33] *Id*. at 502.

false information. This reasoning, however, is entirely consistent with providing the same protection, *qua* standard of review, for commercial speech as any other speech. Therefore, the subsequent dialogue by the Court in *44 Liquormart* does not reestablish or re-recognize a constitutional justification for a categorical distinction between commercial speech and noncommercial speech.

The justification for categorically distinguishing commercial speech from noncommercial speech given in *Virginia State Board* has been recognized as inadequate, and no adequate justification has been provided to replace it. This alone provides a compelling reason to abandon the separate doctrines and to provide full protection for commercial speech under the First Amendment. A closer look at the Court's commercial speech cases, however, reveals that the Court has implicitly already done so.

The Road to Strict Scrutiny

In 1980, the Court outlined a test designed to provide commercial speech an intermediate level of protection in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[34] The following four-part *Central Hudson* test has since provided the analytic framework used to scrutinize regulations that burden commercial speech. First, the communication must be "neither misleading nor related to an unlawful activity."[35] Second, the "State must assert a substantial interest to be achieved by restrictions."[36] Third, "the restriction must directly advance the state interest involved."[37]

[34] 447 U.S. at 562-63.
[35] *Id.* at 563-64.
[36] *Id.*
[37] *Id.*

Fourth, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[38]

This test was designed to help alleviate the inevitable problems that stem from choosing between affording speech full protection or no protection at all, depending upon whether the speech was sufficiently commercial. However, subsequent cases reveal that the problem of distinguishing between commercial and noncommercial speech, presumably sufficiently mitigated by providing commercial speech limited protection, has not gone away. Instead, the tension and inconsistencies have become manifest in interpretations of parts three and four of the *Central Hudson* test. In the decade following *Central Hudson*, the Court interpreted the *Central Hudson* test in *Posadas* and *Fox* in a way that provided commercial speech little protection from regulation.[39] Predictably, this led to over-regulation of commercial speech, and again raised the stakes for classifying speech as commercial. Following *Posadas* and *Fox*, and as a result of their sanction of over regulation, the Court has steadily strengthened the *Central Hudson* test, which now admits little, if any, difference from the protection afforded noncommercial speech.

In *Posadas*, the Court upheld a Puerto Rico statute providing that casinos could not "advertise or otherwise offer their facilities to the public of Puerto Rico."[40] In applying part three of the *Central Hudson* test, the Court stated that the statute directly advanced the governmental interest by reducing the demand of casino gambling merely because advertising, by its very nature, increases the demand for a product.[41] By

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[38] *Id.*
[39] *Posadas*, 478 U.S. at 332; *Fox*, 492 U.S. at 482.
[40] *Posadas*, 478 U.S. at 332.
[41] *Id*. at 342.

recognizing such a presumption about the effect of advertising, part 3 presented virtually no obstacle for the government to overcome in most cases.

In applying part 4 of the test, the Court recognized 2 reasons why the Puerto Rico statute did not restrict speech more than necessary.[42] First, the statute did not ban advertising to tourists.[43] Second, because the government could have banned gambling altogether, it could regulate gambling through the statute.[44] The Court also declined to consider the possibility of using government speech to counter casino advertising as an alternative means of achieving Puerto Rico's objective.[45] In doing so, the Court, in effect, left it to legislatures to interpret whether the objective could be achieved by a more limited restriction, which simply *is* part 4 of the *Central Hudson* test.

The Court further interpreted part 4 of the *Central Hudson* test in *Fox*. The Court rejected the least-restrictive-means test and instead explained that the means/end "fit" was "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[46] Therefore, after *Posadas* and *Fox*, the government simply could presume that the restricted advertising increased the demand for the product, thereby satisfying part 3 of the *Central Hudson* test; and the government itself could determine which means were reasonable to serve the interest. At the time of the *Fox* decision then, *stare decisis* was an obstacle to affording commercial speech full First Amendment protection.

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[42] *Id*. at 343-46.
[43] *Id*. at 343.
[44] *Id*. at 346; *see also United States v. Edge Broadcasting*, 509 U.S. 418, 428 (1993) (upholding ban on some casino advertising partly because government could have banned all such advertising).
[45] *Id*. at 344.
[46] *Fox*, 482 U.S. at 480 (quotations and citation omitted).

Subsequent to *Fox*, however, the Court has steadily strengthened the *Central Hudson* test, most explicitly in *Rubin v. Coors Brewing Co*.[47] In *Rubin*, the Court rejected the claim from *Posadas* that direct advancement of the governmental objective is presumed by a restriction on advertising because advertising, by its nature, is designed to promote a product.[48] The Court also rejected the claim in *Posadas* that because a government could restrict all advertising, or the activity being promoted by the advertising, it is free to regulate the commercial speech.[49] Finally, the Court considered alternative, less-restrictive means as relevant to part four of the *Central Hudson* test.[50] In addition, under *Rubin*, if the government wanted to restrict commercial speech, it had to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." [51]

After *Rubin*, the *Central Hudson* test placed a substantial burden on the government when it sought to restrict commercial speech. In fact, parts 3 and 4 have come to resemble closely the "narrowly tailored" requirement of strict scrutiny. The most substantial difference between the *Central Hudson* test and strict scrutiny is that part 2 of the former requires only a substantial governmental interest and the latter a compelling governmental interest. But this difference amounts to very little if the Court adopts the implication of Justice Stevens' view in *44 Liquormart* that protecting

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[47] 514 U.S. 476 (1995). The strengthening of the Central Hudson test was foreshadowed in *Cincinnati v. Discovery Network Inc*., 507 U.S. 410 (1993), where the Court stated that courts and legislatures had "attache[d] more importance to the distinction between commercial and noncommercial speech [than we do] . . . and [had] seriously under estimate[d] the value of commercial speech." *Id*. at 419.
[48] *Id*. at 490; *see also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 189 (1999) (rejecting unsupported presumption that casino advertising increased demand for gambling).
[49] *Id*. at 483 n.2.
[50] *Id*. at 488.
[51] *Id*. at 487.

consumers qualifies as a compelling governmental interest.[52] Adopting this view also accounts for part 1 of the *Central Hudson* test because protecting consumers will be needed most when the speech is misleading or promotes an unlawful activity. Adopting Justice Thomas's more sweeping view—that protecting consumers is *per se* illegitimate—would be a more substantial departure from the present *Central Hudson* test. However, as discussed earlier, the debate between Justices Stevens and Thomas is, in substance, independent of the debate over which level of scrutiny to apply when reviewing restrictions on commercial speech. Because of this, extending full First Amendment protection to commercial speech, after *44 Liquormart,* did not cut against the Court's precedent.

After *44 Liquormart*, the Court applied the *Central Hudson* test in *Greater New Orleans Broadcasting Assoc. v. United States*,[53] to invalidate a restriction on radio advertising for private casinos. *Greater New Orleans* is also consistent with recognizing no distinction between commercial and noncommercial speech. The Court did not depart from its interpretation of the *Central Hudson* test in *44 Liquormart* and *Rubin*. Indeed, the *Greater New Orleans* Court explicitly stated that it was not replacing the *Central Hudson* test because the case presented "no need to break new ground [where] . . . *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."[54] The reason for this is that the "more recent cases," which included *Rubin* and *44 Liquormart*, in substance, had abandoned lesser scrutiny for commercial speech.

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[52] *44 Liquormart*, 517 U.S. at 502.
[53] 527 U.S. 173 (1999).
[54] 527 U.S. at 184.

Since *Greater New Orleans*, the Court has twice refused to confront directly the issue of whether the distinction between commercial and noncommercial speech should be formally abandoned. Both times, the Court stated that, as in *Greater New Orleans*, the case presented "no need to break new ground."[55] However, once again the test applied by the Court is functionally not one of lesser scrutiny. While in the first case, *Lorrilard Tobacco v. Reilly*, the Court stated that it need not apply the least-restrictive-means test of strict scrutiny to examine the commercial speech restrictions, in the second case,[56] *Thompson v. Western States Medical Center*, the Court struck down the government restrictions because there were alternatives that only the Court had considered.[57] In fact, as the dissent in *Thompson* noted, to the extent some type of lesser scrutiny still applies to commercial speech restrictions, the majority has "applie[d] the commercial speech doctrine too strictly."[58] While the dissent correctly characterized the test applied by the majority, the proper criticism is not that the Court has abandoned lesser scrutiny for commercial speech restrictions, but rather that it has done so without formal announcement.

Conclusion

Affording commercial speech full First Amendment protection is the natural extension of (and perhaps entailed by) the Court's jurisprudence already in place. Just as the Court has come to recognize that regulations on sexually-explicit but nonobscene

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[55] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (quotations and citations omitted); *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) (quotations and citations omitted).
[56] *Lorillard Tobacco*, 533 U.S. at 555.
[57] *Thompson*, 535 U.S. at 372-73.
[58] *Id*. at 388 (Breyer, J., dissenting).

speech must survive strict scrutiny,[59] the Court implicitly has come to recognize that commercial speech deserves no less protection. The distinction between commercial and noncommercial speech is a distinction without a constitutional difference. More important, the constitutional differences not only do not track the distinction, but carry too much significance for an imprecise definition to bear. The Court should be cautious in attempting to clarify definitions prior to engaging the constitutional analysis, as the more fruitful approach will nearly always be to settle upon definitions, if necessary at all, as part of constitutional analysis.

[59] *Compare Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976), *with United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 827 (2000).

CHAPTER 4[126]

TAKING LIBERTY WITH HUMEAN NECESSITY

Introduction

This chapter provides a different kind of example of the relationship between law and philosophy. In this chapter, I will illustrate another way in which philosophy can help those engaging in legal analysis avoid taking wrong turns, even if philosophy cannot definitively indicate the direction legal analysis should take. The example involves the relationship between philosophical debates concerning free will and legal debates over the extent to which free will is relevant to legal accountability.

Many scholars consider compatibilists to argue persuasively against so-called libertarians (roughly, those who deny that causal necessity applies to actions we consider free), but fail to address seriously the concerns of so-called hard determinists (roughly, those who deny that there are free actions because causal necessity applies to actions we consider free). David Hume is taken to exemplify this shortcoming in compatibilist accounts. In his chapters on liberty and necessity, Hume argues that we cannot plausibly deny that causal necessity applies to actions we consider free, but provides no reason to believe that the actions we consider free actually are free. In other words, Hume argues

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[126] Reprinted with kind permission of Springer Science and Business Media. Springer, *Moral Psychology Today: Essays on Values, Rational Choice, and the Will*, 2008, 207-23, Taking Liberty with Humean Necessity: Compatibilism and Contingency, Troy L. Booher.

that the libertarian notion of freedom is implausible, but does not provide a positive account of free action that explains why hard determinists are mistaken when they claim that causal necessity precludes actions from being free. This apparent shortcoming leaves hard determinists understandably unsatisfied.

This traditional reading of Hume is mistaken, and understanding why sheds light on the perennial debate between compatibilists and hard determinists, which, in turn, sheds light upon how the law should (not) address legal responsibility with science alone. Hume not only provides an adequate positive account of freedom (i.e., of the kind of freedom required for moral accountability and agency), but, once properly understood, also provides insight into why arguments between compatibilists and hard determinists cannot be resolved in the abstract and seem to end in stalemate. In short, Hume's account reveals that the question of whether causal necessity precludes the kind of freedom required for moral responsibility and agency depends upon contingent, empirical facts, and therefore the answer to this question could change over time. If this account is correct, the "winner takes all" framing of the disputes between hard determinists and compatibilists is misguided and misleading.

To reach this conclusion, however, it is important first to understand why the traditional reading of Hume is incorrect. Toward that end, this essay first describes an interpretative puzzle generated by Hume's chapters on liberty and necessity and then provides a solution to that puzzle. The solution reveals that Hume's account of freedom is not contained in his chapters on liberty and necessity as the traditional reading of Hume supposes, but instead is contained in Hume's discussion of moral sentiments. Hume's positive account of freedom places him in the 'reactive attitudes' camp of

compatibilists, but with a recognition that reactive attitudes can change. This recognition permits Hume's account to explain the fact that views on agency and responsibility have changed throughout history, reveals how disputes between hard determinists and compatibilists can be resolved, and, perhaps, sheds new light on contemporary disagreements over whether, for example, genetic predispositions are relevant to moral responsibility, and if so, how.

The Interpretative Puzzle

Hume describes his *Treatise* discussion of liberty and necessity as putting "the whole controversy in a new light, by giving a new definition of necessity" (Hume 1998, 661). According to this new definition, necessity consists in "the constant union [of objects] and the inference of the mind" (Hume 1978, 400). Paul Russell has argued that many traditional interpretations of Hume's discussion of liberty and necessity fail because they provide a role for Hume's definition that is merely consistent with the rest of his discussion instead of essential to it (Russell 1995). While Russell's criticism is well taken, surprisingly, Russell's own interpretation of Hume is subject to the same criticism. Russell's interpretation does not explain what Hume meant when he said that his "new definition of necessity" put "the whole controversy in a new light."

One of the great merits of Russell's book is that it reveals a major interpretive puzzle. Different interpretations of Hume's discussion of liberty and necessity can be understood as attempts to solve this puzzle. The following three claims are all persuasively attributed to Hume by Russell (1995):

> Humean Necessity: Necessity consists in the constant union of objects and the inference of the mind.

> Anti-libertarian Claim: Any liberty that means a lack of necessity does not exist and would make morality impossible.
>
> Internal Cause Claim: Free actions are distinguished from unfree ones, not by the absence of a cause, but rather by the type of cause (11-12).

Conjoining these three claims leads to an interpretive puzzle, which is described below.

According to one possible interpretation of Hume, someone acts freely just whenever the cause of her action is of the right type, for instance, her willing.[127] On this interpretation, recognizing the Internal Cause Claim is all that is essential to understanding when actions are free. But notice that if freedom requires compliance only with the Internal Cause Claim, then it seems that Humean Necessity is *not* essential to Hume's discussion. If we distinguish free actions by the type of cause, then it is irrelevant what account we give of the necessity involved in the causal relation.[128] Hume's announcement that his new definition of necessity puts the whole controversy in a new light, however, requires an essential role for Humean Necessity to play. This interpretation seems inadequate because Humean Necessity is merely consistent with the overall discussion rather than essential to it. Call this the 'Not Essential Problem.'

It is tempting to think that this way of reading Hume can easily be amended to provide an essential role for Humean Necessity: it is essential because a 'stronger' kind of necessity would threaten freedom.[129] After all, Hume believes that a 'weaker' kind of necessity destroys freedom, as the Anti-libertarian Claim shows. Hume also believes that

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[127] This position is advanced by Thomas Hobbes. Hobbes argues that my actions are free when "I can do as I will," which is compatible with necessity in free actions (Chappell 1999, 16). Hobbes does not subscribe to Hume's definition of necessity, and thus it seems unlikely that Hume's new definition plays an essential role for this type of compatibilism.

[128] Following Hume, I assume throughout that causal relations are 'inseparable' from necessity. Because of this, I will sometimes speak of causal relations and other times of necessary connections, but both are implied whenever either is used. I also assume that puzzles involving determinism and free will or free action do not differ significantly from puzzles involving causal necessity and free will or free action.

[129] This position is advanced by John Stuart Mill (1874).

mistaking mere causation for compulsion—in Hume's terms, for "force, and violence, and constraint"—is a major confusion that leads others to find necessity a threat to freedom (Hume 1978, 407). So perhaps the essential role that Humean Necessity plays is that it allows one to respect the Anti-libertarian Claim while distinguishing actions that are caused from actions that are compelled.

This amended interpretation suffers from three problems. First, it seems to ignore Hume's Internal Cause Claim, which states that we identify actions as free by reference to the type of cause. Second, it is a mistake to think that Humean Necessity aids in distinguishing causation from compulsion. Whether an action is compelled depends upon the type of cause rather than the type of necessity involved in the causal relation itself. The difference between a person going across the room because she is pushed and because she wants a drink of water requires reference to types of causes and not the types of necessity involved in the causal relations. Third, while some contemporary compatibilists may want to hold a position akin to the amended interpretation, such a position cannot be attributed to Hume. A compatibilist could maintain that in all possible worlds where the type of necessity is 'stronger' than Humean Necessity, there are no free actions. Hume, however, believed that a 'stronger' necessary connection would not threaten freedom.

For Hume, an action must be free for it to be an action for which one could properly be held responsible. But whether one can properly be held responsible depends upon dispositions to praise and blame. Thus, unless believing that there was a 'stronger' causal relation would alter dispositions to praise and blame, the 'stronger' causal relation *would not* affect our practice of holding each other responsible; nor *should* it affect our

practice for Hume as long as our relevant sentiments continue to approve of our practice overall. But we should not expect such effects, or anyway, we should not attribute that expectation to Hume. In the *Enquiry*, Hume argues that even if one were convinced that (i) the Creator initially caused whatever originates all actions and (ii) every deed was contributing to an overall good, these convictions would have little affect upon our moral ascriptions because "[t]he mind of man is so formed by nature that, upon the appearance of certain characters, dispositions, and actions, it immediately feels the sentiment of approbation or blame" (Hume 1975, 102). Hume did not believe that moral ascriptions would be affected by belief in a 'stronger' causal connection.

The amended interpretation of the role that Hume provides for Humean Necessity is mistaken, not simply because it misunderstands what it takes for an action we consider free to be compelled, but also because it wrongly interprets Hume as thinking that a 'stronger' causal relation would threaten freedom. Call this the 'Not Hume Problem.'

The interpretive puzzle has now emerged. How can one provide an interpretation of Hume that distinguishes free actions by the type of cause, and yet provides Humean Necessity an essential and acceptable role to play?

Paul Russell has attempted to solve this interpretative puzzle. Russell correctly points out that (i) moral praise and blame are, according to Hume, felt rather than judged, (ii) one must have access to another's character to have the necessary moral feeling, and (iii) one can have access to another's character only by making a causal inference. The necessity involved in causation is consequently needed for the moral sentiments of praise and blame (Russell 1995).[130] Thus, according to Russell, Humean Necessity is essential

[130] Russell's actual argument is as follows:

1. Approval and disapproval are essential to morality.

because, without it, Hume has no basis to claim that we have access to another's character to judge her. Russell's interpretation avoids the Not Essential Problem and the Not Hume Problem.

Russell's interpretation fails. Although Russell has outlined a position Hume holds, Russell has failed to explain why Hume thinks that he has shed "new light" on the "long disputed question of liberty and necessity" in the *Treatise* "by giving a new definition of necessity." It is essential to judging someone responsible that one make inferences between character and actions. It is also essential to making those inferences properly that one experience a constant conjunction between types of character and types of actions, which certainly essentially involves Humean Necessity. However, this does not explain why Hume thinks that his definition of necessity sheds any *new* light on the problem. The inference between character and actions requires at least Humean Necessity, but it does not require Humean Necessity specifically. The much 'stronger' understandings of necessity that Hume is arguing against in the *Treatise* would allow inferences from actions to character just as well. In fact, any account of causal necessity that implies causal connections are inferentially detectable, or at least have constant conjunction as a consequence, will work. Russell has found *an* essential role for Humean Necessity, but has failed to find *the* essential role that Hume claims puts the "whole controversy in a new light."

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2. Only character traits or mental qualities arouse our moral sentiments of approval and disapproval.
3. Knowledge of a person's character traits or mental qualities requires inference.
4. A person or thinking being is held responsible if we regard her as an object of a moral sentiment.
5. Regarding an agent as responsible is, therefore, a matter of feeling not judgment.
6. Without inference to character (i.e., necessity), no such feeling could, as a matter of psychological fact, be aroused in us, and therefore no one could be regarded as responsible.

(Russell 1995, 64). It is an empirical psychological fact that without necessity morality would be impossible.

Solution to the Interpretative Puzzle

To solve the interpretive puzzle, the controversy Hume thought he was shedding light upon must be considered more carefully. Plainly enough, the controversy Hume was addressing was the controversy during the time he wrote, which perhaps is best understood by examining the debate concerning liberty and necessity between Thomas Hobbes and John Bramhall.

Bramhall claims that real necessity and true liberty are incompatible with one another. Bramhall makes this claim by drawing upon the common intuition that "if it be inevitably imposed upon me . . . [it is] impossible for me to choose whether I shall undergo it or not" (Chappell 1999, 43). Bramhall, however, does not deny that free actions have causes. Instead, he merely denies that these causes necessitate free actions in the same way as causes that do not involve free actions necessitate their effects. One way Bramhall does this is by drawing a (somewhat unclear) distinction between "absolute necessity" and "necessity upon supposition." Bramhall claims that only the latter type of necessity applies to free actions. Hobbes refuses to draw this distinction, thereby provoking Bramhall to distinguish two kinds of necessity:

> [T]here is a great difference between determining and being determined. If all the collateral causes concurring to the production of an effect were antecedently determined, what they must of necessity produce and when they must produce it, then there is no doubt but the effect is necessary. But if these causes did operate freely or contingently, if they might have suspended or denied their concurrence, or have concurred after another manner, then the effect was not truly and antecedently necessary, but either free or contingent . . . . So [human] necessity is no absolute, no antecedent, extrinsical necessity, but merely a necessity upon supposition (Chappell 1999, 44).

While this paragraph contains a number of claims worth discussion, for understanding the 'controversy,' it is important to note only that Bramhall believes his distinction between two kinds of necessity is required to explain both how actions are free and how free actions involve contingency.

In contrast, Hobbes argues for the familiar position previously outlined as having the Not Essential Problem. Hobbes claims that if the will causes an action, then the action is free, and that this kind of freedom is compatible with there being only one kind of necessity (Chappell 1999). Only the type of cause determines whether an action is free for Hobbes, and thus, the 'strength' of the necessity involved in the causal relation is irrelevant. There is no reason to recognize two kinds of necessity because the existence of free actions does not depend upon it. Ultimately, the debate between Hobbes and Bramhall boils down to disagreement over whether more than one type of necessity is needed to account for free actions. That was the controversy at the time Hume wrote.

This controversy is one on which Hume's new definition of necessity does shed light. Hume admits that it is conceivable that given any cause the effect will fail to occur (Hume 1978). Hume nonetheless believes that the same kind of necessity applies to all cause/effect relations. Hume accounts for the common intuition Bramhall relies upon—that no "absolute necessity" applies to free actions—but only because Hume finds no "absolute necessity" in *any* causal relation. As Hume states, "I do not ascribe to the will that unintelligible necessity, which is suppos'd to lie in matter[; instead] I ascribe to matter, that intelligible quality . . . which [all] must allow to belong to the will. I change, therefore, nothing in the receiv'd systems, with regard to the will, but only with regard to material objects" (Hume 1978, 410).

Hume also agrees with Hobbes that there is no reason to posit more than one kind of necessity. Thus, Hume's new definition of necessity resolves the Hobbes/Bramhall controversy by acknowledging contingency in free actions without positing two kinds of necessity. For Hume, "there is but one kind of necessity, as there is but one kind of cause, and . . . the common distinction betwixt moral and physical necessity is without any foundation in nature" (Hume 1978, 171). The controversy that Humean Necessity resolves is whether free actions are necessitated just as other natural events, not whether or how actions are free. Because both Hobbes and Bramhall simply assume that there are free actions (actions for which one can be held accountable), there was no controversy on that issue.[131]

Interpreting Hume as referring to the Hobbes/Bramhall controversy in the *Abstract* explains the essential role that Humean Necessity plays in Hume's discussion of liberty and necessity while avoiding both the Not Essential Problem and the Not Hume Problem. The Not Essential Problem is that if free actions are distinguished by the type of cause, then Humean Necessity is inessential to Hume's account of liberty. To say that Humean Necessity is inessential to Hume's account of liberty, however, is not to say that it is inessential to resolving the controversy at the time. Humean Necessity resolves the controversy over whether the same kind of necessity applies both to free actions and to other natural events. It is this controversy that Hume's new definition of necessity plays an essential and acceptable role in resolving.

The Not Hume Problem is that providing an essential role for Humean Necessity seems to imply that a 'stronger' causal relation would rule out freedom, and this is not

[131] Anthony Collins and Samuel Clarke have a debate similar to the one between Hobbes and Bramhall. Collins and Clarke make only slightly different distinctions, and Hume's new definition of necessity similarly resolves their controversy (Clarke 1999; O'Higgins 1976; Ferguson 1974).

Hume's view. While Hume argues that there is no 'stronger' causal relation, Hume also believes that free actions would not be compromised if there were a 'stronger' causal relation. Hume does appear to believe that the contingency recognized by Humean Necessity explains the intuition exploited by Bramhall that there is contingency in human action, but this does not mean that Hume must agree with Bramhall that 'stronger' necessity would threaten free actions. Taking Hume to refer to the Hobbes/Bramhall controversy when he says that his "new definition of necessity" sheds "new light" on the "long disputed question of liberty and necessity" solves the interpretive puzzle.

Taking Hume to refer to the Hobbes/Bramhall controversy also makes better sense of Hume's sections on liberty and necessity in both the *Treatise* and the *Enquiry*. Hume's argument in the *Treatise* is structured in two stages. Hume first points out that (i) necessity is the constant union of objects and the inference of the mind and (ii) free actions are united together just as regularly and produce inferences in the mind just as often as other natural events. As a result, there is no reason to deny that free actions are necessitated because (i) we can predict free actions just as well as other natural events; (ii) predictions are based upon cause/effect reasoning; and (iii) necessity and cause/effect relations are inseparable. Because Hume has previously argued that Humean Necessity applies to all natural events, Hume's argument directly implies that there is only one kind of necessity. Hume's new definition shows that the same kind of necessity applies both to free actions and to other natural events because, given Hume's definition, nobody would deny that Humean Necessity applies to both. In this way, Hume's new definition directly resolves the Hobbes/Bramhall controversy. This is the bulk of Hume's argument in the *Treatise* (Hume 1978).

In what remains, Hume explains why people mistakenly deny that necessity applies to free actions. First, people confuse liberty of spontaneity (an internal cause) with liberty of indifference (a lack of necessity) (Hume 1978). Hume points out that free action requires only the former. Second, people have a false sensation of liberty of indifference when they act and therefore believe they could have chosen whether to do otherwise (Hume 1978). The sensation is false, however, because given enough information about circumstances, character, and motives, human behavior is just as predictable as that of a watch. Finally, people mistakenly assert that morality and responsibility require liberty of indifference (Hume 1978). Hume shows that responsibility instead *requires* Humean Necessity because one needs to infer motive and character from action in order to judge another properly. So Russell is correct that this is *an* essential role of Humean Necessity, but he is incorrect that this is *the* essential role that sheds "new light" on "the controversy."

Hume's argument in the *Enquiry* differs only slightly. Hume argues that because causal necessity is at most union and inference, it applies to free actions just as it applies to other natural events. Hume then defines "liberty" as "a power of acting or not acting, according to the determinations of the will" (Hume 1975, 95). In the *Treatise*, Hume defined "will" as "the internal impression we feel and are conscious of, when we knowingly give rise to any new motion of our body, or new perception of our mind" (Hume 1978, 399). Thus, Hume is referring to liberty of spontaneity of the *Treatise*. Hume thinks that no one would deny that we have this kind of liberty, the kind required by the Internal Cause Claim and the Antilibertarian Claim.

Hume then argues that there is no liberty of indifference because a lack of necessity implies a lack of cause, which reduces the occurrence to mere chance. This is a reductio for Hume because he had previously argued that no philosopher accepts that chance occurs in this sense (Hume 1978; 1975). Again, the bulk of Hume's argument is designed to show that one cannot plausibly deny Humean Necessity applies to free actions, just as it does to other natural events.

Hume's sections on liberty and necessity in both the *Treatise* and the *Enquiry* are designed to show both that actions we consider free involve Humean Necessity just as other natural events and this result is required for actions to be free. Hume's discussion resolves the Hobbes/Bramhall controversy because (i) Humean Necessity consists only of constant conjunction and inference, both of which are obviously present in actions we consider free, and (ii) Humean Necessity is consistent with the intuition that there is contingency in these actions.

The Threat of Hard Determinism

The fact that Hume was primarily addressing the controversy at the time also explains why Hume's chapters on liberty and necessity, standing alone, contribute little to current controversies concerning free action. Neither Hobbes nor Bramhall doubts that there are free actions; they instead disagree over how to account for the fact that there are free actions. Thus, Hume had no reason to address the specific concerns of hard determinists in those chapters.[132]

[132] Although libertarians, as incompatibilists, share some concerns with hard determinists, there was little reason for Hume to take hard determinism itself seriously because the only hard determinist at Hume's time appears to have been Baron d'Holbach.

Yet Hume's chapters on liberty and necessity are incomplete precisely because he does not take the concerns of hard determinists seriously. Hume argues that the actions we consider free must involve causal necessity because Humean Necessity (i) applies to all events and (ii) is required for agency and moral responsibility. Hume does not seem to consider the possibility that causal necessity also precludes actions from being free in the sense we care about, that is, in the sense relevant to moral accountability and agency. While there are metaphysical puzzles involving free will and free action that are interesting for their own sake, the primary motivation of most scholars who attempt to solve such puzzles is the perceived threat to moral responsibility and agency (Dennett 1984). As Jay Wallace recognized, "[w]hat we want is not freedom of the will per se, but the kind of freedom that makes us persons, or deliberators, or autonomous valuers, or morally accountable agents; a desire for freedom that floated loose from all such contexts would be a kind of fetish" (Wallace 1996, 2-3). Galen Strawson shares this view: whether human beings are ever morally deserving of praise or blame or punishment or reward "is the only really troublesome question when it comes to the problem of free will" (Strawson 2002, 441). Hume was not content merely to show that Bramhall could not posit different kinds of necessity to distinguish free actions. Rather, Hume further argued that a lack of Humean Necessity would undermine moral responsibility. Hume recognized that an account of free will or free action that had no implications for moral responsibility is of little interest. For this reason, I also discuss freedom only insofar as it affects agency and moral responsibility. If it turns out that we have no free will, but this fact has (and should have) no impact on our lives as moral agents, then there remains little reason to continue to argue over whether we have free will.

For hard determinists, then, regardless of what account we provide of causal necessity, if the same necessity applies to actions we consider free as applies, for example, to falling rocks, then moral accountability and agency are precluded. Hume has argued that if there are free actions, then they must involve causal necessity, but Hume has not argued that there are free actions (actions for which one can be held morally accountable). Yet this is precisely what the hard determinist denies.

In fact, the only positive account of free action Hume provides in his chapters on liberty and necessity is that for actions to be free, they must have the right type of cause (one's will). Yet such an account is plainly inadequate to address the concerns of the hard determinist: an action caused by one's will is not sufficient for the action to exhibit the type of freedom needed for moral accountability. Some actions caused by the will are not free in the relevant sense, namely actions performed by kleptomaniacs or small children. Despite such obvious difficulties, numerous scholars have assumed that the Internal Cause Claim represents Hume's positive account of freedom in its entirety (Berofsky 2002).[133] We should avoid attributing such a superficial account of freedom to Hume if possible.

Taking Hume's positive account of freedom to come from his chapters on liberty and necessity not only saddles Hume with a superficial account, but it also locates Hume within a debate foreign to him. Hume is typically considered a "traditional compatibilist," belonging to a line of argument later developed by Moore (1912), Hobart (1934), Ayer (1954), Schlick (1966), and Davidson (1973), who advocate a hypothetical or conditional account of freedom. Very roughly, these conditional accounts of freedom hold that if one had chosen to do (or desired or willed) X, then he or she would have done

[133] This point is explained in detail by Paul Russell (1995).

X. Incompatibilists typically respond to traditional compatibilists by arguing that the concern is not that one's choice (or desire or will) does not cause the action, but rather that if causal necessity applies universally, one has no control over the choice (or desire or willing) in the first place (Kane 1996; Klein 1990). Philosophers then engage in what is at base a dispute over the extent to which conditional accounts can survive logical analysis and yet account for whatever 'control' is needed for moral accountability (Lehrer 1966; Inwagen 1983; Berofsky 2002).

For example, Keith Lehrer argues that the analysis of "S can X" cannot be the conditional "If C, then S X's" because this conditional (whatever C is) is logically consistent with "S cannot X" (Lehrer 1966). Hume's response to such an argument would not be to provide a more sophisticated analysis of the relevant conditional, which is the response of the so-called traditional compatibilists (e.g., Chisholm 1964; Davidson 1973), but would be to show that such considerations are beside the point. Such logical analyses, on Hume's view, have no direct implications for moral responsibility: For Hume, what looks like reasoning on moral matters is not a sequence of logically valid inferences, but is directing attention to matters that engage the moral sentiments (Hume 1975, Appendix I).[134] The logical implications of the relevant conditionals have no direct moral implications for Hume, but instead have moral relevance only to the extent they affect moral sentiments. Hume argues that it is not relations detected by reason—such as similarities between parricide by oak trees and parricide by humans or between incest involving humans and incest involving other animals (Hume 1978)—which explain the viciousness of an action or character, but rather "a feeling or sentiment of blame from the

[134] It is noteworthy that Hume's account, despite its use of the term "character," is consistent with claims that predicting behavior is better done by reference to circumstances than enduring traits of the person (Doris 2002).

contemplation of it" (Hume 1978, 469). Hume would think that both sides of the debate over the plausibility of traditional compatibilism simply "over-intellectualize the facts" (Russell 1995, 73; Strawson 1962, 78).

Recall Hume's claim in the *Enquiry* that even if we were convinced that the Creator initially caused whatever causes all actions and every action was contributing to an overall good, it would have little effect upon our moral ascriptions because "[t]he mind of man is so formed by nature that, upon the appearance of certain characters, dispositions, and actions, it immediately feels the sentiment of approbation or blame" (Hume 1975, 102). It must first be determined whether it matters to moral accountability that the Creator is the ultimate cause of actions before it becomes necessary to find creative metaphysical routes to avoid implications for moral accountability. Unless incompatibilists' arguments cause us to disapprove of our overall practice of holding each other (or ourselves) accountable, or at least cause us to do so in individual instances, then such arguments simply have little to do with moral accountability for Hume.[135]

Humean Compatibilism

There is a contemporary strand of compatibilism that is consistent with Hume's views: the reactive attitudes approach developed by Peter Strawson (1962). For Strawson, the question of under which conditions an agent is morally accountable is best

[135] Hume likely would have responded similarly to a related debate over whether alternative possibilities are necessary for moral responsibility (Frankfurt 1969; Kane 1996; Ekstrom 2002). The use of counterexamples in moral debate suggests that issues of moral responsibility admit a precise rational structure, a claim that Hume would deny (Hume 1975, Appendix I). Perhaps when we consider Frankfurt counterexamples our moral sentiments disapprove of the conduct described, but when we consider the further information that causal necessity applies to all actions we consider free, our moral sentiments change. Any resemblance between the two cases that may suggest a reasonable person must treat them the same way is beside the point for Hume—again, as his parricide and incest examples are designed to show (Hume 1978). It is a mistake to make rigid distinctions and then to impose a rational structure using those rigid distinctions upon something that has none, namely the conditions admitting of moral responsibility.

understood as the question of under which conditions it is appropriate to hold an agent morally accountable. And because the latter conditions are explained in terms of "natural human reactions"—that is, susceptibility to reactive attitudes—moral accountability consists in adopting these attitudes toward one another (Strawson 1962). Strawson argues that we *cannot* give up such natural reactive attitudes because they play such a central part of our lives, and we *should* not give up these attitudes because it would impoverish human life, especially interpersonal relationships.

Some scholars have responded to Strawson's arguments by pointing out that, as a matter of fact, (i) human life would not be as impoverished as Strawson claims because he has exaggerated the extent to which our reactive attitudes would have to be altered (Pereboom 1995), and (ii) we could at least give up certain reactive attitudes in appropriate circumstances (Russell 1992). Jay Wallace defends Strawson in light of these attacks (Wallace 1996). Wallace concedes that we *could* abandon the relevant reactive attitudes (for Wallace, resentment, indignation, and guilt) but argues that Strawson's second claim remains persuasive: even if causal necessity does apply to all actions we consider free, there is no reason that we *should* give up our reactive attitudes or, consequently, our practice of holding agents morally accountable (Wallace 1996).

Wallace points out that incompatibilists make unwarranted assumptions about moral responsibility. Specifically, incompatibilists assume that if causal necessity applies to actions we consider free, then it is thereby *unfair* to hold agents accountable for such actions (Wallace 1996). Wallace argues that in the conditions under which we typically find it unfair to hold agents accountable—for example, insanity, addiction, hypnotism, torture—it is the absence of the ability to grasp and act from moral reasons (either

generally or in a specific instance) that explains the unfairness (Wallace 1996) Wallace claims that agency, which most hard determinists also consider to be threatened by causal necessity, is essentially constituted by the ability to grasp and act from moral reasons (Wallace 1996). If correct, then the generalization made by incompatibilists from typical excusing or exempting conditions to all action involving causal necessity is unwarranted because causal necessity does not preclude one from grasping or acting from moral reasons.

Hume belongs to this strand of compatibilism. As Paul Russell correctly observes, for Hume "[o]ne knows an agent is responsible only if one is aware of that person's causing a certain sentiment of approbation or blame" (Russell 1995, 64). Because ultimately all moral assessments concerning the fairness of holding one accountable are derived from moral sentiments, the fairness of holding one accountable for actions involving causal necessity depends upon how this affects moral sentiments. Hume's account is consistent with much of what Wallace claims.

Despite the similarities between Hume and Wallace, however, the differences are significant, and it is beneficial to examine them in some detail. Wallace believes it is the fact that one grasps and acts from moral reasons that explains (or partially constitutes) the conditions in which our moral sentiments[136] are appropriate, whereas Hume believes that grasping and acting from moral reasons is significant *only because* our moral sentiments so inform us. In other words, for Hume there is no *reason* why objects that do not grasp or act from moral reasons are inappropriate objects of praise and blame, as it is simply a

[136]I use "moral sentiments" only to refer to the relevant moral sentiments corresponding to the reactive attitudes at issue (Wallace 1996, 33). Wallace recognizes that such a move to what he calls "dispositional" accounts could result in an account "only notationally different" from the one he advances (Wallace 1996, 33 n.11).

psychological fact that certain objects in certain circumstances arouse our moral sentiments. Any relationship between moral responsibility and grasping and acting from moral reasons is a contingent one for Hume. For Wallace, this relationship is essential to his accounts of agency and moral responsibility.

Advantages of Hume's Account

Hume's account of agency and moral responsibility has distinct advantages over Wallace's account. Hume's account makes better sense of historical changes in the practice of identifying agents and free actions and permits us to diagnose, and perhaps end, the perpetual stalemate between compatibilists and incompatibilists.

Wallace holds that only creatures with an ability to grasp and act from moral reasons qualify as agents (Wallace 1996). History does not reflect this view. Oliver Wendell Holmes traced the forms of liability from ancient societies through the English common law (1991). As Holmes describes, many societies have attached liability to inanimate objects and animals when they were "the immediate cause of offense" (Holmes 1991, 10). The motivation for these practices was "vengeance on the immediate offender" and the resulting judicial process was "expressly directed against the object, animate or inanimate" (Holmes 1991, 10).

For instance, a tree that fell and killed a person "was delivered to the relatives, or chopped to pieces for the gratification of the real or simulated passion" (Holmes 1991, 11). Similarly, in Southern Asia, if a tiger killed a man, his family was disgraced until "they had retaliated by killing and eating the tiger," and "if a man was killed by a fall from a tree, his relatives would take their revenge by cutting the tree down, and scattering

it in chips" (Holmes 1991, 19). Under English common law at the time of King Alfred, if a horse caused a man to drown, then the horse was surrendered; but if the horse caused the man to drown because the man compels "his horse to take the water," the horse was not surrendered because the death was the man's fault, not the horse's fault (Holmes 1991, 21).

Even later, those in medieval England believed that "no difficulty was felt in treating animals as guilty" (Holmes 1991, 22; Blackstone 1765-1769, 300-02). Consider the case of the dog Provetie. In 1595, a dog bit a child's finger while the child was playing with a piece of meat in his hand (Arthur 2006). "The child later died and the dog was arrested, imprisoned, and condemned to death after a trial. The court held that the dog be hanged by 'a rope until death ensues' and then taken to the gallows field, 'to the deterring of other dogs and to all as an example.' The dogs 'goods, should he have any, [were] confiscated and forfeited for the benefit of the countship." These few accounts from history demonstrate that the objects qualifying as agents (in the sense relevant to morality), as well as the actions that trigger moral accountability, has not remained constant throughout history.[137]

On Hume's account, these differences should not be surprising. Because our moral sentiments are, at base, a biological reaction rather than a reaction constituted by reason alone, it would seem more surprising if they had *not* changed over time.

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[137] Bernard Williams explains such differences as follows: "We have conceptions of legal responsibility different from any such conception the Greeks had, but that is because we have a different conception of law—not, basically, a different conception of responsibility" (Williams 1993, 65). Wallace also claims that there are instances in which we "hold people legally responsible without holding them morally responsible" (Wallace 1996, 70 n.27). While there clearly is a difference between legal and moral responsibility—e.g., holding mentally impaired people civilly liable for damages to ensure that those with a stake in their estate will keep them from harming others—the examples Holmes cites do reflect views on moral responsibility, specifically views about fault. A desire to make ancient practices comport with our own is not a reason to refuse to take these examples at face value.

Nietzsche (1967) makes the point a different way using social changes to provide an explanation:

> the cause of the origin of a thing and its eventual utility, its actual employment and place in a system of purposes, lie worlds apart; whatever exists, having somehow come into being, is again and again reinterpreted to new ends, taken over, transformed, and redirected by some power superior to it; all events in the organic world are a subduing, and becoming master, and all subduing and becoming master involves a fresh interpretation, and adaptation through which any previous "meaning" and "purpose" are necessarily obscured or even obliterated. (77)

Whatever the explanation, history seems to confirm that what (we believe) qualifies as an agent or free action has changed over time.

These considerations suggest that it was a mistake for Wallace to identify grasping and acting from moral reasons (abilities other animals and trees do not seem to have) as the essential aspect of agency and moral accountability. In response, Wallace could simply hold that the examples cited are nothing more than examples of moral mistakes, and thus, such evidence does not negatively impact his views. In fact, Wallace would likely use a distinction he draws between mere causal responsibility and moral responsibility to make this claim (Wallace 1996). But this distinction merely explains why *we* (currently) would not consider inanimate objects and other animals morally accountable, as the examples cited indicate that historically the distinction Wallace draws has been rejected. It is a virtue of Hume's account that it straightforwardly explains these historical practices for what they appear to be on their face—reflections of moral views now rejected. There is no reason to believe that, upon reflection, these societies would have rejected their practices were they made aware of the distinction Wallace draws.

A second consideration in favor of Hume's account is that by focusing upon grasping and acting from moral reasons, Wallace is open to the following response by

incompatibilists: acting from moral reasons (just like having an action caused by one's will) is not sufficient for an action to be free because to the extent causal necessity applies universally, it is unfair to hold anyone responsible for *anything* they do regardless of whether they possess these capacities An example of one advancing this type of incompatibilist response is Ishtiyaque Haji. Haji argues that insofar as Wallace's theory makes a claim about the fairness of holding agents accountable for their actions, it adopts the principle that "ought implies can," which is not satisfied if causal necessity applies (Haji 2002, 209). Specifically, Haji argues that the following is a requirement for an action to be morally wrong in the first place: "It is morally wrong for S to do [not to do] A only if S can refrain from doing [do] A" (Haji 2002, 209). From this, Haji claims that if causal necessity "eradicates genuine alternatives, and wrong actions require such alternatives, then the truth of determinism implies that no actions (where action is broadly construed to include choices) are wrong" (Haji 2002, 209). For this reason, Haji claims, it is unfair to hold agents accountable if causal necessity applies to their actions.

Haji's argument is nearly identical to incompatibilist arguments advanced in response to traditional compatibilists: Haji's argument can be summarized as roughly, for grasping and acting from moral reasons to have moral relevance, the supposed agent must have some control over what she grasps or over whether she acts on the moral reasons; whereas the typical response to traditional compatibilists is roughly, for the (type of) cause of the action to have moral relevance, the supposed agent must have some control over the cause itself. A response is available to Wallace: Wallace's account better captures our concrete moral judgments concerning excuses for and exemptions from moral responsibility, which means that the principle involving alternative

possibilities that Haji cites requires independent justification; a justification, Wallace would claim, Haji cannot provide (Wallace 1996).

For the point made here, it is not important whether Haji or Wallace ultimately has the better argument. Instead, it is important to note only that if Wallace is correct, then the fact that causal necessity applies to actions we consider free has no moral relevance at all because it does not affect whether one grasps and acts from moral reasons. Yet this conclusion fails to account for the common intuition Bramhall exploited (and almost all incompatibilists share) that causal necessity is at least *relevant* to assessing moral responsibility. Wallace attempts to explain this intuition as part of a moral mistake, but, much like Wallace's response to the historical examples, this response does not seem to take the intuition (which lingers nonetheless) seriously enough.

The inadequacy of Wallace's responses becomes more apparent in light of the fact that the change in which objects society considers agents has nothing to do with grasping and acting from moral reasons. Instead, is likely the ability to understand the behavior of inanimate objects and other animals mechanistically that explains the historical changes. Any account that ultimately concludes causal necessity is wholly irrelevant to moral responsibility and agency fails to capture the very intuition upon which the compatibilist/incompatibilist debate rests. For these reasons, such compatibilist solutions seem open to the charge that they simply beg all of the important questions.

Much as Hume's account mediates the Hobbes/Bramhall controversy, Hume's account permits us to mediate the Wallace/Haji controversy. Disputes over which objects are agents and which actions are free cannot be resolved in the abstract, but instead

present a contingent moral question dependent upon our moral sentiments. Considerations relevant to moral responsibility are those considerations that arouse our moral sentiments when we contemplate them. Recognizing that causal necessity applies to all actions we consider free (just like recognizing the Creator ultimately caused all our actions) has little affect upon our moral ascriptions because "[t]he mind of man is so formed by nature that, upon the appearance of certain characters, dispositions, and actions, it immediately feels the sentiment of approbation or blame" (Hume 1975, 102). For this reason, Hume believes that, as a matter of fact, causal necessity is not a threat to moral responsibility or agency. By Hume's own standards, however, this is a contingent fact.

For Hume, disputes over whether causal necessity precludes moral responsibility are (at base) not different from disputes over whether a certain upbringing excuses subsequent bad acts in our criminal justice system or whether a genetic predisposition excuses certain behavior. People of good faith can and do disagree about such matters. Even if we conclude that one's upbringing does not excuse, it remains a morally *relevant* consideration. Similarly, even if we conclude having a genetic predisposition to engage in certain behavior does not excuse, it also remains a morally relevant consideration. In the same way, causal necessity remains morally relevant even if we conclude that it is not an excuse and does not exempt one from moral responsibility.

Wallace is correct that, for example, insanity is different from causal necessity because the former exempts while the latter does not. Wallace is incorrect, however, that to consider the latter an exemption is to make a mistake of reason by employing irrelevant considerations. Haji is correct that Wallace simply ignores morally relevant

considerations—roughly, the eradication of genuine alternatives or the power to pursue them—but is incorrect that these considerations *preclude* moral responsibility and agency altogether. Haji is entitled to claim only that these considerations are morally relevant insofar as they affect moral sentiments, not that these considerations are dispositive. Causal necessity is compatible with moral accountability and agency because moral sentiments survive contemplation of the implications of causal necessity. However, this "victory" by compatibilists is not absolute, and cannot be. Because our moral sentiments change over time, the relationship between causal necessity on the one hand and agency and actions we consider free on the other hand also could change over time. Thus, while compatibilists seem to have the upper hand, the most they can claim is that hard determinists are currently mistaken, which, after all, is all that is needed.

Conclusion

The legal lesson in this discussion is that current trends to treat brain science as dispositive of issues concerning legal accountability should be viewed with great skepticism. Such science must be filtered morally to have relevance to accountability, which means such science should not be used to show, for example, compulsion as a matter of law to excuse otherwise criminal behavior or that it would be unconstitutional to hold someone legally culpable given their brain state. Instead, science is relevant for juries determining guilt and policymakers who inject moral considerations into law. While legal scholars are correct to insist that discussions of free will remain relevant to criminal law, they are incorrect that those discussions should examine free will from a

metaphysical, rather than a moral, perspective (Kaye 2007). Philosophy once again teaches that its debates do not translate directly into law.

CONCLUSION

There are limits to how much light philosophy can shed on legal issues. While the methods of philosophy are valuable to those analyzing law, the conclusions of philosophers are more likely to cause confusion than clarity if they are imported into the decisions judges make in interpreting law. The primary problem exemplified in this dissertation is confusing a conceptual issue for a practical one.

For example, while philosophy of language is useful in understanding the nature of language, it is of limited use in shedding light on how we should understand and interpret language. Language develops imprecisely because precise definitions are hardly ever required in ordinary language, so we should not be surprised when attempts to provide precise definitions to address legal issues consist of *creating* precision instead of *discovering* precision. And we should not be surprised when normative considerations creep into our creating that precision. For that reason, attempts to solve legal issues with precise definitions tend to obscure normative issues lurking in the background, which in turn results in more confusion, not more clarity.

Hopefully, this dissertation has provided reasons to think through the limits of interdisciplinary work, but not to question its value. The message is not "stop," but "proceed with caution." Discovering the limits of a discipline or theory does not limit its usefulness, but instead serves to ensure it is used properly. In the end, those discoveries may facilitate more meaningful interdisciplinary dialogue. That is my hope.

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